

No. 22-2364  
ORAL ARGUMENT NOT REQUESTED

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

LARONDA PHOX,  
*Petitioner*

v.

SECRETARY,  
U.S. DEPARTMENT OF LABOR,  
*Respondent,*  
THE SAVOY AT 21C  
*Intervenor*

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On Appeal from the Administrative Review Board,  
U.S. Department of Labor, ARB Case No. 2021-0057

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**BRIEF FOR THE SECRETARY OF LABOR**

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## **SUMMARY OF THE CASE**

This case arises under the employee protection provisions of the Food Safety Modernization Act (“FSMA” or the “Act”). LaRonda Phox (“Phox”) alleged that she experienced adverse employment actions because of her protected activity, which included making reports of food safety concerns to her managers. After a two-day hearing, an Administrative Law Judge (“ALJ”) dismissed her complaint.

Phox filed an untimely motion for reconsideration before the ALJ, after the ten-day deadline under the applicable regulation had expired. Following denial of her motion, she filed an untimely petition for review before the Administrative Review Board (“ARB”). The ARB determined that because Phox’s motion for reconsideration was untimely, it did not toll the time for filing her administrative petition for review. As a result, the ARB dismissed her petition for review. The ARB subsequently denied reconsideration of its dismissal decision.

At issue is whether the ARB’s decision to dismiss Phox’s petition for review was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Secretary of Labor (“Secretary”) does not believe that oral argument is necessary to resolve this petition, but requests that the parties be given equal time if argument is ordered.

## **PARTIES, RULINGS, AND RELATED CASES**

Except for Intervenor—The Savoy at 21c—all parties appearing before this Court are listed in the Brief of the Petitioner.

References to the rulings by the ALJ—*LaRonda Phox v. The Savoy at 21c*, ALJ No. 2019-FDA-00014—appear in the Brief of the Petitioner. However, Phox does not cite to the proceedings before the ARB—*LaRonda Phox v. The Savoy at 21c*, ARB No. 2021-0057, 2022 WL 355156 (ARB Jan. 6, 2022).

Phox filed a separate breach of contract and negligence case in federal district court stemming from her employment with The Savoy at 21c, but that case does not allege claims under the FSMA. The district court granted summary judgment to The Savoy at 21c in that case. *Phox v. 21C Mgmt. LLC*, No. 20-CV-00846-SRB, 2022 WL 345654 (W.D. Mo. 2020). Phox subsequently appealed the district court decision to this Court where it remains pending. *Phox v. 21C Mgmt. LLC*, No. 22-1453 (8th Cir.).

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## STATEMENT OF JURISDICTION

This case arises under the employee protection provisions of the Food Safety Modernization Act, 21 U.S.C. 399d (hereinafter “the Act” or “FSMA”), and its implementing regulations, 29 C.F.R. Part 1987 *et seq.* The Secretary of Labor (“Secretary”) had subject matter jurisdiction based on a complaint filed on November 19, 2018 with the Occupational Safety and Health Administration (“OSHA”) by LaRonda Phox (“Phox”) against her former employer, The Savoy at 21c (“The Savoy”), under 21 U.S.C. 399d.

On January 6, 2022, the Administrative Review Board (“the Board” or “the ARB”) issued a final decision and order dismissing Phox’s untimely appeal.<sup>1</sup> On April 26, 2022, the Board issued an order denying Phox’s motion for reconsideration of the January 6, 2022 order. On June 27, 2022, Phox filed a timely petition for review with this Court, which has jurisdiction to review the Secretary’s final order because Phox resided in Missouri, where the violation allegedly occurred, at the time of the alleged violation. 21 U.S.C. 399d(b)(5)(A) (review of final order of the Secretary may be obtained in the court of appeals of the circuit in

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<sup>1</sup> The Secretary has delegated authority to the Board to issue final agency decisions under the employee provisions of the FSMA. Secretary's Order 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board for, among other things, reviewing whistleblower complaints under the FSMA), 85 Fed. Reg. 13,186, 13,187 (Mar. 6, 2020).

which the violation allegedly occurred or in which the complainant resided on the date of the violation); 29 C.F.R. 1987.112(a).

## **STATEMENT OF THE ISSUE**

Whether the Board correctly determined that Phox’s petition for review with was untimely filed and whether the Board acted within its discretion in concluding that there was no basis to excuse the late filing? (29 C.F.R. 18.93; 29 C.F.R. 1987.110(a); *Sanders v. Clemco Indus.*, 862 F.2d 161 (8th Cir. 1988); *Soo Line R.R., Inc. v. Admin. Rev. Bd. of the United States Dep’t of Lab.*, 990 F.3d 596 (8th Cir. 2021); *Madison v. U.S. Dep’t of Labor*, 924 F.3d 941, 946 (7th Cir. 2019)).

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

The FSMA provides whistleblower protections to employees of entities that are “engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food.” 21 U.S.C. 399d(a). An employee who believes that they have been subjected to retaliation for lawful whistleblowing under the FSMA may file a complaint with the Secretary. 21 U.S.C. 399d(b)(1). A whistleblower complaint must be filed with the Secretary within 180 days of the alleged violation. *Id.* The Secretary has delegated responsibility for receiving and investigating whistleblower complaints under the FSMA to the Assistant Secretary for Occupational Safety and Health. Secretary’s Order 08-2020, Delegation of

Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58,393 (Sept. 18, 2020); *see also* 29 C.F.R. 1987.103(b), .104(a). Following an investigation, OSHA issues a determination either dismissing the complaint or finding retaliation and ordering appropriate relief. 29 C.F.R. 1987.105(a).

Either the complainant or the respondent may file objections to OSHA's determination within 30 days and request a *de novo* hearing before a Department of Labor Administrative Law Judge. 29 C.F.R. 1987.106(a). Except as provided in 29 C.F.R. Part 1987, proceedings before the ALJ under the FSMA are governed by the procedures in 29 C.F.R. Part 18, subpart A. 29 C.F.R. 1987.107(a). The ALJ may hold a hearing in the case or decide the case on dispositive motions if appropriate. The regulations provide parties an opportunity to request reconsideration by the ALJ within 10 days after service of the decision on the moving party. 29 C.F.R. 18.93.

The ALJ's decision is subject to discretionary review by the Board. 29 C.F.R. 1987.110(a). Any party seeking such review must file a petition for review with the Board within 14 days of the date of the ALJ's decision. *Id.* If no timely petition for review is filed with the Board, the ALJ's decision in the case becomes a final order of the Secretary that is not subject to judicial review. 29 C.F.R. 1987.109(e), .110(b). If a petition for review is filed and the Board accepts review,

the Board's decision generally becomes the final order of the Secretary reviewable in the court of appeals for the circuit in which the violation allegedly occurred or in which the complainant resided on the date of the alleged violation. 21 U.S.C. 399d(b)(5)(A); 29 C.F.R. 1987.112(a). The Secretary retains the authority to review decisions made by the Board under the FSMA. *See* Secretary's Order 01-2020, 85 Fed. Reg. 13,186, 13,187-88 (establishing a process for discretionary review by the Secretary of decisions rendered by the Board).

## **B. Statement of Facts**

On July 9, 2018, Phox started working at The Savoy, which, among other things, operates a restaurant. Certified List ("C.L.") 63 at 8. Phox was initially hired as a server. *Id.* Throughout her tenure at the restaurant, Phox observed and reported several conditions that she alleged were unsanitary, including allegations that coffee condiments were improperly stored, utensils were left in food containers, and employees were eating in the food preparation areas as well as alternating between washing dishes and preparing food. *Id.* at 9-11.

Throughout her employment, Phox received progressive coaching and feedback from her supervisors regarding her work as a server and runner for the restaurant's in-room dining that served The Savoy's attached hotel. For example, Phox struggled to use the point-of-sale software and failed to initially pass a quiz related to menu items in the restaurant. C.L. 63 at 10. Managers began to note her

inconsistent performance, regarded her as having a dismissive approach to colleagues, and recalled incidences where she swore at colleagues in frustration over a food order. *Id.* at 11-13.

On September 10, 2018, Phox placed an anonymous tip regarding potential health code violations to the Kansas City Health Department, including chefs who alternated between dishwashing and food preparation and the concerning appearance of one of the chefs that Phox alleged was unsanitary. C.L. 63 at 11. Health department inspectors came to the restaurant and found no violations. *Id.*

On October 3, 2018, Phox posted disparaging reviews of her employer online after dining in the restaurant (though none of the online complaints were about sanitary conditions of the restaurant). C.L. 63 at 13. Phox was coached again by management regarding her negative online review where they noted that the behavior was against company policy. *Id.* at 14.

On or about October 4, 2018, Phox received a “C” rating on her 90-day performance review, indicating that she was meeting expectations, but was just above the threshold for being placed on a 30-day probationary period. C.L. 63 at 15. Despite the coaching, managers reported to leadership that Phox remained combative about several issues, including the restaurant’s tip pooling policy, and that they had observed her continuing to call the restaurant’s food “disgusting” and “gross.” *Id.* at 16.

After an email exchange with the Area Director of Human Resources, Phox's managers met with her on October 12, 2018 and formally terminated her employment for "ongoing performance and behavior that has remained uncorrected and unimproved despite multiple coaching and discipline" sessions that occurred on four different occasions. C.L. 63 at 16.

### **C. Proceedings before the ALJ and ARB**

Phox subsequently filed a complaint with OSHA alleging retaliatory discharge due to complaints about food safety that she alleged violated the FSMA. C.L. 63 at 1. OSHA dismissed her complaint on May 12, 2019 based on its conclusion that there was insufficient evidence to establish reasonable cause to believe that a violation had occurred. *Id.* Phox then requested a hearing before an ALJ. *Id.*

#### **1. The ALJ's Decision and Order**

On May 25, 2021, following a hearing, the ALJ issued a decision dismissing Phox's complaint. C.L. 63 at 28-29. The ALJ concluded that Phox had made food safety complaints protected under FSMA and had suffered an adverse employment action when The Savoy terminated her employment. *Id.* at 23-24. However, the ALJ further concluded that Phox failed to establish a causal relationship between the protected activity and the adverse action by showing that her protected activity was a contributing factor in the termination decision. *Id.* at 24-28. Alternatively,

the ALJ found that The Savoy had shown by clear and convincing evidence that it would have terminated Phox's employment even absent her protected food safety complaints. *Id.* at 28.

## **2. The ALJ's Denial of Reconsideration**

On June 9, 2021, Phox filed a "Motion to Stay and Motion to Reconsider or Motion for Extension of Time" requesting that the ALJ reconsider the May 25, 2021 decision and order. C.L. 64 at 1. Phox argued that multiple documents were withheld that, if considered, would have changed the outcome of her case. *Id.* at 1-2. The Respondents (now Intervenors) responded in opposition noting that all the documents Phox identified had been provided during discovery. *Id.* at 3.

The ALJ denied the motion for reconsideration on July 14, 2021. C.L. 72 at 5. First, the ALJ concluded that Phox had filed her motion for reconsideration outside of the applicable limitations period. Under 29 C.F.R. 18.93, a motion to reconsider must be submitted within 10 days of service of the decision. C.L. 72 at 4. Phox submitted her motion after the 10-day period had expired. *Id.*

Further, relying on the standard for considering motions to reconsider under Federal Rule of Civil Procedure 60(b), the ALJ concluded in the alternative that there was no basis for reconsideration. *See* 29 C.F.R. 18.10 (noting that where the OALJ Rules of Practice and Procedure do not note a standard, the Federal Rules of Civil Procedure apply). Grounds for reconsideration under Rule 60(b) include



“mistake, inadvertence, surprise, or excusable neglect;” “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);” “fraud . . . , misrepresentation, or misconduct by an opposing party;” and “any other reason that justifies relief.” The ALJ concluded that Respondents convincingly identified all the documents as being among those that were previously provided to Phox during discovery and the only basis for Phox not seeing the documents was her own computer problems, an issue that would not rise to fraud, misrepresentation, or misconduct. C.L. 72 at 4. Moreover, the ALJ concluded, many of the documents at issue did not go to the central questions of Phox’s whistleblower complaint and thus the documents would not alter the outcome of the May 25, 2021 decision. *Id.*

### **3. The ARB’s Order**

On July 28, 2021, Phox filed a petition for review with the Board. C.L. 73. In her Petition, Phox disputed the ALJ’s findings and conclusions of law in the May 25, 2021 decision and order. However, Phox presented no arguments regarding the motion to reconsider or the ALJ’s denial of that motion.<sup>2</sup>

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<sup>2</sup> Instead, Phox argued that the ALJ failed to consider the fact that the Kansas City Health Department’s investigative letter was unsigned and lacked relevant notes and context, C.L. 73 at 6-7; that the ALJ failed to register that one of the chef’s whose appearance was the cause of one of her complaints was never called as a witness, *id.* at 5-6; that despite the record evidence, she was retaliated against for complaining about food safety issues, *id.* at 7; that her managers lied about the certain food safety complaints, staged a guest order to make her appear combative,

On August 11, 2021, the Board issued a briefing order in the case requiring Phox to submit her brief within 28 days. C.L. 74. Phox then submitted a motion to treat her petition for review as her opening brief, which was granted. C.L. 77.

Then, on January 6, 2022, the Board dismissed Phox's petition for review. C.L. 80 at 3. After briefly describing the procedural history, the Board noted that Phox's petition for review focused solely on the May 25, 2021 decision and order and not the ALJ's July 14, 2021 order dismissing Phox's late motion for reconsideration. *Id.* at 2. Therefore, the Board concluded that it was Phox's intention to appeal the May 25, 2021 decision and order only. *Id.*

The Board noted that a timely motion for reconsideration may toll the time to file a petition for review under the Federal Rules of Appellate Procedure. C.L. 80 at 2. Yet, an untimely motion does not have that effect. *Id.* at 3. Therefore, since the ALJ properly found that Phox's motion for reconsideration was untimely, it did not toll the limitations period to file a petition for review. *Id.* Because Phox's petition for review was filed beyond the 14-day deadline and the motion for reconsideration did not toll that deadline, the Board dismissed the petition. *Id.*

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and failed to provide her employee handbook materials. *Id.* at 8-10. Phox also alleged that that she was not present from one of the coaching sessions, that she passes a food service quiz, that she was given performance reviews outside of the 90-day window in the company policy, and that she never made derogatory remarks in front of colleagues. *Id.* at 10-11.

#### **4. The ARB's Denial of Reconsideration**

On January 18, 2022, Phox filed a motion to reconsider before the Board. C.L. 81. Phox argued in her motion that her motion for reconsideration before the ALJ was not filed late and reiterated her arguments alleging errors and misrepresentations in the May 25, 2021 decision and order. C.L. 82 at 2-3. The Board noted that there are only limited circumstances under which it would reconsider its decisions. Since there were no material differences in fact or law from those presented to the Board that Phox would not have been aware of through reasonable diligence, no new material facts that occurred after the decision, no change in law, and no failure of the Board to consider material facts presented, there was no basis for reconsideration. C.L. 83 at 2.

#### **SUMMARY OF ARGUMENT**

Phox was required to file her petition for review before the Board within 14 days of the date the ALJ issued her decision and order resolving Phox's FSMA retaliation complaint. Phox failed to file within that time. Instead, she filed her petition for review with the Board 64 days after the the ALJ's decision and order was issued (or 50 days from the last day to file a petition for review).

While the Board noted that a timely motion for reconsideration before the ALJ could have tolled the period for Phox to file a petition for review, Phox's motion for reconsideration to the ALJ was also untimely filed beyond the

applicable 10-day deadline. Thus, it did not toll the time for Phox to file her petition for review with the Board.

When presenting the basis for appeal before the Board, Phox directed her attention to issues related to the ALJ's decision and order and offered no argument regarding why her motion for reconsideration before the ALJ should have been considered timely filed. Therefore, the Board reasonably determined that Phox was attempting to appeal the ALJ's decision and order and not the ALJ's decision that her motion for reconsideration was untimely filed. Since both the petition and the motion for reconsideration were filed late, and Phox offered no persuasive excuse for her late filings, the Board reasonably determined that Phox had failed to timely petition for review of the ALJ's decision and that there was no basis to toll the deadline. Thus, the Board correctly dismissed this matter and this Court should affirm the Board's dismissal decision.

### **STANDARD OF REVIEW**

Judicial review under the FSMA is governed by the Administrative Procedure Act. *See* 21 U.S.C. 399d(b)(5)(A). Under this deferential standard, the Court will uphold the ARB's decision unless it is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); *Mercier v. United States Dep't of Lab., Admin. Rev. Bd.*, 850 F.3d 382, 387-88 (8th Cir. 2017). Under this standard, the Board's conclusion that Phox's petition for

review was untimely filed is reviewed de novo, granting deference to the Board's reasonable interpretations of the FSMA. *BNSF Ry. Co. v. United States Dep't of Lab. Admin. Rev. Bd.*, 867 F.3d 942, 945 (8th Cir. 2017); *see also Bess v. Barnhart*, 337 F.3d 988, 989 (8th Cir. 2003) (“We review de novo a district court’s determination that a complaint seeking judicial review of the Commissioner’s decision is untimely.”).

The Board’s determination regarding whether to equitably toll the period for filing a petition for review with the Board and whether to grant or deny motions for reconsideration are reviewed for abuse of discretion. *Soo Line R.R., Inc. v. Admin. Rev. Bd. of the United States Dep't of Lab.*, 990 F.3d 596, 600 (8th Cir. 2021) (holding that the Board appropriately exercised its equitable powers and did not abuse its discretion in granting reconsideration and tolling the deadline for filing a petition for review where there was a delay in serving the ALJ’s decision and incongruities in the record regarding when the ALJ decision was issued); *Madison v. U.S. Dep't of Labor*, 924 F.3d 941, 946 (7th Cir. 2019).

## ARGUMENT

### **A. The Board Correctly Determined that Phox’s Petition for Review was Untimely Because it was Filed After the end of the Limitations Period for the Filing of Petitions for Review.**

A party seeking review of a decision of an ALJ under FSMA must file a written petition for review with the Board within 14 days of the date of the decision of the ALJ. 29 C.F.R. 1987.110(a); *Madison*, 924 F.3d at 943 (noting 14-day deadline to file petition for review with the Board under FSMA). Phox failed to file a timely petition for review.

In this case, the limitations period to file a petition for review began to run when the ALJ entered her decision on May 25, 2021. C.L. 63. Phox did not file a petition for review with the Board until July 28, 2021—64 days after the ALJ’s decision was entered (or 50 days after the last day to file a petition for review in this case). C.L. 73. This is longer than the 14-day period prescribed by regulation, which would have made Phox’s petition for review due Tuesday, June 8, 2021. *See* 29 C.F.R. 1987.110(a). Therefore, the Board correctly found that Phox’s petition for review was not timely filed under the applicable regulatory deadline. *See* C.L. 80 at 3-4; *Sparre v. United States Dep’t of Lab., Admin. Review Bd.*, 924 F.3d 398, 402 (7th Cir. 2019) (“When the Board articulates a satisfactory explanation for finding an appeal untimely, based on its examination of the relevant facts and law . . . its decision is neither arbitrary nor capricious.”).

**B. The Board Reasonably Concluded that Phox’s Untimely Motion for Reconsideration to the ALJ did not Toll the Deadline for Filing her Petition for Review with the Board and no Other Basis Existed to Toll the Deadline.**

The time for filing a petition for review with the Board is not jurisdictional and may be tolled in appropriate circumstances. *Soo Line R.R., Inc. v. Admin. Rev. Bd. of the United States Dep’t of Lab.*, 990 F.3d 596, 600 (8th Cir. 2021); *Madison*, 924 F.3d at 946. As the Board noted in its decision dismissing Phox’s petition for review, a petitioner’s timely filing of a motion for reconsideration with the ALJ is one circumstance that will toll the time to file a petition for review before the Board. C.L. 80 at 2 (analogizing to Federal Rule of Appellate Procedure 4(a)(4)(A)).<sup>3</sup> In such circumstances, the “limitation period runs from the denial of a *timely petition* . . . rather than from the date of the order itself.” C.L. 80 at 3 n.5 (quoting *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991)) (emphasis added). However, untimely motions for reconsideration do not toll the limitations period. *Id.* at n.6 (citing *Sanders v. Clemco Indus.*, 862 F.2d 161, 168-71 (8th Cir. 1988)). This is true even where the ALJ considers the merits of an untimely motion for reconsideration. *Id.* (relying on *Banks v. Chicago Bd. of Educ.*, 750 F.3d 663, 666-67 (7th Cir. 2014) (holding that untimely filed 60(b) motion did not toll the time

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<sup>3</sup> The Board uses the principles of the Federal Rules of Appellate Procedure when evaluating motions for reconsideration. See *Henin v. Soo Line R.R. Co.*, ARB No. 2019-0028, slip op. at 2 (ARB Mar. 22, 2019).

for filing a petition for review notwithstanding that the district court considered the untimely motion on the merits)).

Here, Phox filed her motion for reconsideration with the ALJ on Wednesday, June 9, 2021, 15 days after the original decision and order were served. Under 29 C.F.R. 18.93, a motion for reconsideration must be filed within 10 days after the service of the decision on the moving party. Phox was electronically served with the ALJ's decision on the same day it was handed down, making her motion due Friday, June 4, 2021. C.L. 63 at 31 (including a service sheet certifying that Phox was electronically served on May 25, 2021). Therefore, because Phox filed her motion after the 10-day deadline, the Board correctly determined that it was untimely filed and thus it did not toll the period to file a petition for review.

The Board also appropriately interpreted Phox's petition for review to the Board as an appeal of the May 25, 2021 ALJ decision and not the June 14, 2021 denial of her motion for reconsideration. Under the applicable regulations and Board precedent, "parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived." 29 C.F.R. 1987.110(a); *see, e.g., Jenkins v. E.P.A.*, ARB No. 15-046, 2018 WL 2927663, at \*10 n.49 (ARB Mar. 31, 2018) (holding under analogous whistleblower statute to FSMA that because the EPA did not assert that a ruling



was “legal error on the part of the ALJ in its Petition for Review, the error is deemed to have been waived”); *Majali v. AirTran Airlines*, ARB No. 04-163, 2007 WL 3286329, at \*7 (ARB Oct. 31, 2007) (“[Complainant] did not raise this argument in his petition for review and thus it is waived.”); *Talukdar v. U.S. Dep’t of Veteran Affairs*, ARB No. 04-100, 2007 WL 352434, at \*6, 10 (ARB Jan. 31, 2007) (noting “[t]he Board reviews only those aspects of the ALJ decision that are specified in the petition for review and listed in the Board’s notice of review” and holding under analogous whistleblower statute to FSMA that party had forfeited an argument not raised in the petition for review). Phox made no argument regarding the motion for reconsideration in her petition for review and focused her arguments solely on the ALJ’s findings of fact and conclusions of law rendered on May 25, 2021. C.L. 80 at 2. At the time Phox filed her petition for review with the Board, the ALJ had denied her motion for reconsideration as untimely. C.L. 72 at 4. Thus, Phox had been made aware that the motion was untimely. Under the circumstances, the Board reasonably found that in the absence of any indication in the petition for review that Phox disagreed with the ruling that her motion for reconsideration was untimely, Phox had failed to appeal that decision.

The Board also reasonably found that no other basis existed to toll the deadline for Phox to petition for review of the ALJ’s decision. The ARB may equitably toll the deadline for filing a petition for review where “a litigant has

pursued [their] rights diligently but some extraordinary circumstance prevents [them] from bringing a timely action.” *Madison*, 924 F.3d at 947 (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 1 (2014)). Such equitable tolling, however, is sparingly granted. *Soo Line*, 990 F.3d at 600. The ARB considered that Phox argued in her reply to The Savoy’s motion to dismiss her administrative petition for review that she made an effort to comply with the procedural rules while acting pro se. C.L. 80 at 3 n.9. However, the Board determined that her pro se status was insufficient to excuse her failure to comply with the applicable deadlines. *Id.* That determination was consistent with the ARB’s past decisions in similar circumstances. *See, e.g., Canterbury v. Adm’r, Wage & Hour Div.*, ARB No. 2003-0135, 2004 WL 3038067, at \*3 (ARB Dec. 29, 2004) (noting that while the Board does provide a degree of latitude to pro se complainants, it also “must be able to impose appropriate sanctions . . . when they fail to comply with the . . . procedures in the administrative process,” for a “pro se party may not be allowed to avoid the risks of failure that attend his decision to forgo expert assistance”) (internal quotations omitted).

Phox has raised no arguments in her petition for review to this Court that her motion for reconsideration should be regarded as timely or that another basis existed to toll the regulatory deadline for her petition for review to the Board. As discussed below, the arguments in her opening brief to this Court focus on her

disagreements with the ALJ's decision on the merits of her retaliation claim and her disagreements with a federal district court decision in a separate case brought against The Savoy. *See infra* section D. Accordingly, this Court should hold that the ARB appropriately determined that Phox's untimely motion for reconsideration to the ALJ did not toll the deadline for her administrative petition for review and that no other grounds existed to extend the deadline.

### **C. The Board Reasonably Denied Phox's Motion for Reconsideration.**

The Board also appropriately refused to reconsider its decision to dismiss Phox's administrative petition for review. "The [Board] is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the Board issued the decision." *Soo Line*, 990 F.3d at 598 (quoting *Wimer-Gonzales v. J.C. Penney Corp*, ARB No. 10-148, 2012 WL 694503, at \*2 (ARB Feb. 7, 2012)). However, reconsideration is appropriate only in "limited circumstances." *Id.* (citing *Getman v. Sw. Sec., Inc.*, ARB No. 04-059, 2006 WL 3246901, at \*1 (ARB Mar. 7, 2006)). The Board may reconsider a decision where a party demonstrates (1) material differences in fact or law from those presented of which the moving party could not have known through reasonable diligence, (2) new material facts that occurred after the Board's decision, (3) a change in the law after the Board's decision, or (4) failure to consider material facts presented to the Board before its decision. C.L. 83 at 2; *see*

*also Soo Line*, 990 F.3d at 598-99. In her motion for reconsideration to the Board, Phox alleged that witnesses committed perjury during the hearing before the ALJ, that these acts had the effect of misrepresenting the facts presented, and that she had timely filed her petition for review. C.L. 83 at 2-3. Yet, Phox offered no additional facts to support these arguments, nor did she point to any change in the law that could have justified reconsideration. *See* C.L. 81. Therefore, the Board appropriately denied Phox's motion for reconsideration, since Phox failed to demonstrate that she satisfied any of the circumstances warranting reconsideration.

**D. Phox's Arguments on the Merits of her FSMA Retaliation Claim are not Properly Before this Court.**

In her appeal to this Court, Phox raises several issues that are not germane to the ARB's dismissal of this case. For instance, she argues that the ALJ erred by determining that she was not retaliated against for reporting food safety issues and that her protected activity was not a contributing factor to the adverse employment actions. Petitioner's Brief at 1-2. She argues that the ALJ failed to consider that there were missing notes from a Kansas City Health Department report from their inspection of The Savoy and failed to consider that some of the respondent's witnesses had misrepresented her employment. *Id.* at 2. She contends that she was upholding public policy and therefore should not have been terminated. *Id.* Moreover, she claims that the ALJ should have decided several factual and legal

issues in her favor, including that The Savoy’s reasons for her termination were pretextual, *id.* at 5, that the proximity of a city health department inspection and her first instance of formal discipline supported her contributing factor argument, *id.* at 7, and that a change in her position was further evidence of retaliation, *id.* at 8. She also appeared to contest several aspects of the district court’s decision in her separate breach of contract and negligence case against The Savoy, which is the subject of a separate appeal pending before this Court. *See, e.g., id.* at 1 (noting here, and elsewhere, that she is appealing a ruling from the “Missouri Court of Appeals Western District” in this administrative appeal); *Phox v. 21C Mgmt. LLC*, No. 20-CV-00846-SRB, 2022 WL 345654, \*3 (W.D. Mo. Feb. 4, 2022) (granting 21c Management’s summary judgment motion on all claims); *Phox v. 21C Mgmt. LLC*, No. 22-1453 (8th Cir., March 3, 2022) (petition for review of the district court’s grant of summary judgment).

The only question properly before the Court in this case is whether the Board’s decision to dismiss Phox’s administrative appeal of her FSMA whistleblower claim because it was not timely filed was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. Phox’s complaint to the Department of Labor involved only whether Phox suffered retaliation in violation of the FSMA, as the Department of Labor did not have jurisdiction to hear her state law claims, never purported to hear those claims, and is not and

never was a party to the Western District of Missouri case. *See generally* 21 U.S.C. 399d (granting the Secretary of Labor authority to investigate and adjudicate employee protection claims under FSMA); 29 C.F.R. Part 1987 (providing procedures for the Department’s processing of FSMA retaliation claims only).

Moreover, the merits of Phox’s FSMA claim are not properly before this Court. Under the Act, “if no timely petition for review is filed” with the Board “the decision of the ALJ will become the final order of the Secretary. . . not subject to judicial review.” 29 C.F.R. 1987.110(b); *Madison*, 924 F.3d 943. As previously discussed, the Board determined that Phox failed to timely file a petition for review with the Board. This Court’s review is limited to the Board’s dismissal of Phox’s administrative appeal for failure to timely file a petition for review. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943) (“As a general rule in administrative law cases, a reviewing court may not affirm an agency’s decision on a ground not addressed by the agency, but, rather, will remand for the agency to address the issue in the first instance.”). For the reasons previously discussed, the Board’s decision to dismiss Phox’s administrative appeal was proper.<sup>4</sup>

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<sup>4</sup> However, if this Court were to find that the ARB abused its discretion by dismissing Phox’s appeal, the proper remedy would be to remand to the Board for consideration of the merits of her FSMA claim. At this stage, however, Phox’s arguments about the merits of her FSMA retaliation complaint are not properly before the Court.

## CONCLUSION

For the foregoing reasons, this Court should hold that the Board appropriately dismissed Phox's administrative petition for review and affirm the Board's decision.

Date: November 28, 2022

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## CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limits of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,588 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared using a Microsoft Word proportionally spaced typeface (14-point Times New Roman font).
3. This brief complies with 8th Cir. R. 28A(h) because this brief is a searchable PDF created from the original word processing file and the brief has been scanned for viruses and is virus-free.

Dated: November 28, 2022

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## CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2022 I electronically filed the foregoing Brief for the Secretary of Labor with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

Service of the foregoing will be accomplished by the CM/ECF system for all participants in the case.

Dated: November 28, 2022

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