No. 19-_____

In The
Supreme Court of the United States

DENNIS THOMAS THOMPSON,

Petitioner,

v.

ANDREW M. SAUL,
Commissioner of Social Security,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

JEFFREY P. JUSTMAN
Counsel of Record
NICHOLAS J. NELSON
ROBERT C. GALLUP
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Ctr.
90 S. Seventh St.
Minneapolis, MN 55402
(612) 766-7000
jeffrey.justman@faegrebd.com

Counsel for Petitioner
Dennis Thomas Thompson

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

This Court has long "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period"—including where the claimant filed on time, but in the wrong forum. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (citing *Burnett v. New York Central R. Co.*, 380 U.S. 424 (1965); *Herb v. Pitcairn*, 325 U.S. 77 (1945)). But the Courts of Appeals have applied this rule inconsistently. Some allow equitable tolling when the initial forum is an improper *venue*, but not when the initial forum lacks *jurisdiction*. Others disagree and hold that the initial forum's jurisdiction is not a prerequisite to equitable tolling. More recently, this Court has suggested that equitable tolling may be restricted to cases where the tardiness of a party's filing was caused by factors "beyond its control."

Here, Dennis Thompson timely sought judicial review of the denial of Social Security benefits, but mistakenly sent his complaint to the wrong address. Equitable tolling would have been allowed had the wrong address been merely an improper venue, but he sent his appeal to the Social Security Administration, a forum which lacks jurisdiction.

The question presented is: when a party mistakenly but timely files a case in a forum that lacks jurisdiction, can that ever support equitably tolling the statute of limitations?

PARTIES TO THE PROCEEDING AND RELATED CASES

Petitioner Dennis Thomas Thompson was the applicant in the Social Security Administration and the plaintiff-appellant in the courts below.

Respondent the Commissioner of Social Security was the defendant-appellee in the courts below.

In the District Court this action was No. 16-cv-1003 (D.Minn.), judgment entered January 6, 2017.

In the Court of Appeals this action was No. 17-2111 (8th Cir.), judgment entered March 22, 2019.

There are no other cases arising out of the same judgment. A civil action seeking review of an earlier decision regarding Petitioner's Social Security benefits was filed in 2012 and voluntarily dismissed in 2013. *Thompson v. Colvin*, No. 12-cv-2873 (D.Minn.).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

This Court's longstanding precedents recognize that equitable tolling may be appropriate when a plaintiff files the right pleading at the right time, but in the wrong forum. But while all the Courts of Appeals allow such tolling in some circumstances, they disagree about *which* circumstances. Some Circuits allow equitable tolling only if the initial forum was an improper venue, but not if it lacked jurisdiction entirely. Other Circuits impose no such limitation on equitable tolling.

Most recently, this Court's decision in *Menominee Indian Tribe v. United States* suggested that equitable tolling may be available only if a plaintiff's late filing was caused by factors "beyond its control." *Menominee* did not discuss how that rule relates to this Court's precedents regarding equitable tolling for misdirected filings. But here, the Eighth Circuit applied it to bar equitable tolling because Petitioner sent his Social Security complaint to the agency, which lacked jurisdiction. In doing so, the Eighth Circuit joined the stricter side of the circuit split.

Thus, the question presented by this case has two closely related subparts. First, did *Menominee* implicitly overturn the Court's long-settled rule allowing equitable tolling for timely but defective filings? And second, if *Menominee* did not implicitly overrule the earlier cases, which side of the circuit split is correct? Must the original forum really have had jurisdiction in order for equitable tolling to be available?

The Court should grant certiorari because the lower courts have not settled, and cannot settle, these questions on their own. Moreover, clarity in this area is important. If the defective-pleading precedents are not good law after *Menominee*, as the Eighth Circuit suggested, that would cast doubt on the availability of equitable tolling in a wide array of cases.

Fortunately, while achieving clarity on these issues is important, it is not difficult. Although *Menominee*'s "external obstacle" rule applies to most instances of equitable tolling, it plainly does not and should not apply to this Court's longstanding tolling doctrines that are incompatible with it, such as the "defective pleading" doctrine. That is especially true where, as here, the relevant limitations period is part of a statutory scheme that is unusually protective of claimants.

Nor is it hard to discern the correct side of the circuit split. If a timely filing in the wrong forum gives the defendant adequate notice of the plaintiff's claims, then for equitable-tolling purposes it matters not a whit whether the forum defect goes to jurisdiction or venue. Either way, the purposes of the statute of limitations have been served, and equitable tolling should be available if the other circumstances of the case warrant it.

The Court should grant certiorari to clarify these matters.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 919 F.3d 1033, and reproduced in the Appendix at App.1.

The opinion of the district court is not reported, but is reproduced in the Appendix at App.10.

The decisions of the Social Security Administration are reproduced in the Appendix at App.14 and App.22.

JURISDICTION

The Court of Appeals issued its opinion on March 22, 2019 and denied Petitioners' timely petition for rehearing on May 22, 2019. On August 12, Justice Gorsuch extended the time in which to file this Petition to September 19.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 405(g) provides in relevant part that "Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the

mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business...."

STATEMENT OF THE CASE

A. The Time Period For Seeking Judicial Review Of Social-Security Denials Is Subject To Equitable Tolling.

When the Social Security Administration denies an application for benefits, § 405(g) allows the applicant to file suit seeking judicial review "within 60 days ... or within such further time as the Commissioner ... may allow." This Court has held that "the 60-day requirement is not jurisdictional, but rather constitutes a period of limitations," and so is subject to "traditional equitable tolling principle[s]." *Bowen v. City of New York*, 476 U.S. 467, 478, 480 (1986) (citation omitted).

Equitable tolling of a limitations period, of course, "follow[s] a tradition in which courts of equity ... relieve hardships ... from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity." *Holland v. Florida*, 560 U.S. 631, 650 (2010) (quotation marks and citation omitted). This allows the courts "to honor [a statute]'s remedial purpose without negating the particular purpose of the filing requirement, to give

prompt notice to the [defendant]." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002) (citation omitted).

In considering equitable tolling under the Social Security Act, this Court has described the Act's procedural scheme as "'unusually protective' of claimants." *Bowen*, 476 U.S. at 480 (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)). Section 405(g) itself expressly "authorize[s] the [SSA] to toll the 60-day limit," which shows Congress' "clear intention to allow tolling in some cases." *Ibid.* Pursuant to that authority, the SSA's regulations state that it "may grant an extension where a suit was not timely filed because of ... mistake" or "where the claimant misunderstands the appeal process." *Id.* n.12; *see* 20 C.F.R. § 404.982 (requests for extensions are evaluated "us[ing] the standards explained in § 404.911"). The regulations give "[e]xamples of circumstances where good cause [for an extension] may exist," 20 C.F.R. § 404.911(b), and the examples include a situation where the applicant "sent the request to another Government agency in good faith within the time limit." *Id.* § 404.911(b)(8).

B. The Courts Of Appeals Disagree On When A Timely-But-Defective Filing May Be Eligible For Equitable Tolling.

1. A timely filing in the wrong forum can support equitable tolling in some circumstances.

This Court has long "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period." *Irwin*, 498 U.S. at 96; *accord Young v. United States*, 535 U.S. 43, 50 (2002). Of the types of "defective pleadings" that the Court referred to in *Irwin*, perhaps the best-known example is a putative class action that ultimately fails to garner class certification: the putative class members' claims are equitably tolled during its pendency. *See Irwin*, 498 U.S. at 96 & n.3 (citing *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974)).

But the original "defective pleading" cases arose from a different scenario—when a plaintiff files suit within the statutory period, but in the wrong forum, and does not correct the mis-filing until after the statutory period expires. The Court's two leading cases in this area arose under the Federal Employers' Liability Act. In *Herb v. Pitcairn* the plaintiff filed a FELA suit in a city court in Illinois that lacked jurisdiction, but that under Illinois law could "transfer" the case "to a court which does have jurisdiction." 325 U.S. 77, 78-79 (1945). This Court held that this was sufficient to toll the statute of limitations, but reserved the question "[w]hether the action would be barred if state law

made new or supplemental process necessary." *Id.* at 79. Subsequently, in *Burnett v. New York Central Railway Co.*, the Court held "that when a plaintiff begins a timely FELA action in a state court having jurisdiction, and serves the defendant with process and plaintiff's case is dismissed for improper venue, the FELA limitation is tolled during the pendency of the state suit." 380 U.S. 424, 434-35 (1965). The Court noted that in those circumstances, the plaintiff "did not sleep on his rights," and provided the defendant with papers "notifying him that petitioner was asserting his cause of action." *Id.* at 429. As a result, the defendant "could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy." *Id.* at 430. In light of "the humanitarian purpose of the FELA," the Court concluded "that Congress would not wish a plaintiff deprived of his rights when no policy underlying a statute of limitations is served in doing so." *Id.* at 434

The *Burnett* Court also was concerned to avoid "a substantial nonuniformity" that would result if equitable tolling were not available. *Id.* at 433. There is no question, the Court noted, that an action could proceed if it was timely filed in a court that was the wrong venue, but that had power to transfer the case to the correct venue. *Id* at 433-434. But it would make little sense for the case's timeliness to turn on an arbitrary procedural detail such as the initial forum's authority to transfer it. *Id.* at 434. As a result, the Court held, equitable tolling can be available regardless whether

the initial forum can transfer the case. But since the forum defect in *Burnett* went to venue rather than jurisdiction, the Court had no need to consider whether a non-venue, jurisdictional defect would support equitable tolling.

Since *Burnett*, the lower courts have uniformly recognized the point that this Court implicitly made in *Irwin*: the equitable-tolling principles of *Burnett* and *Herb* "extend[] beyond the FELA context," *Oltman v. Holland Am. Line, Inc.*, 538 F.3d 1271, 1279 (9th Cir. 2008) (quoting *Booth v. Carnival Corp.*, 522 F.3d 1148, 1151 n.4 (11th Cir. 2008)), and apply to many different statutory and contractual limitations provisions, including those in the Social Security Act. *See Jackson v. Astrue*, 506 F.3d 1349, 1357-58 (11th Cir. 2007). That is also consistent with this Court's broader decision in *Irwin*, which eschewed an ad hoc inquiry into the specific language of different statutes, in favor of "a more general rule to govern the applicability of equitable tolling in suits against the Government." 498 U.S. at 95.

Thus, pursuant to *Herb* and *Burnett*, the lower courts agree that "filing a case in the wrong forum" but "during the statutory period" can warrant equitable tolling in at least some cases. *Kerr v. Merit Sys. Prot. Bd.*, 908 F.3d 1307, 1313 (Fed. Cir. 2018) (quoting *Irwin*, 498 U.S. at 96); *accord, e.g.*, *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996) (equitable tolling permissible where the claimant timely "asserted his rights in the wrong forum") (citation omitted); *LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Zone Mgmt. Comm'n*, 866 F.2d 616, 626 (3d Cir. 1989)

(tolling can be based "on the plaintiff's mistake in filing in the wrong forum").

In doing so, the Courts of Appeals have recognized that *Herb* and *Burnett* require "reject[ing the] suggestion that ... filing in an improper venue constitutes the type of 'mere negligence' for which equitable tolling is inappropriate," or that filing in the wrong place is "at best a garden variety claim of excusable neglect." *Booth v. Carnival Corp.*, 522 F.3d 1148, 1152 (11th Cir. 2008) (quoting *Irwin*, 498 U.S. at 96). The difference, the courts recognize, is that by making a timely-but-misdirected filing, "the plaintiff took some step recognized as important by the statute before the end of the limitations period," *Perez v. United States*, 167 F.3d 913, 918 (5th Cir. 1999), and so the defendant "was aware within the limitation that [plaintiff] was actively pursuing his cause of action." *Booth*, 522 F.3d at 1152. Consequently, just as in *Burnett*, "[t]he underlying policy of repose ... is not violated by equitable tolling." *Ibid.*

2. The Courts of Appeals disagree about when filing in the wrong forum supports equitable tolling.

But the Courts of Appeals have parted ways when it comes to the question that this Court left unanswered in *Burnett*: what if a plaintiff timely files claims in a forum that does *not* have jurisdiction? Can equitable tolling be available then? On this question, the

Courts of Appeals "have reached differing conclusions." *Jaquay v. Principi*, 304 F.3d 1276, 1288 (Fed. Cir. 2002).

The Eleventh Circuit has read *Herb* and *Burnett* narrowly. It holds "that filing in a court *without competent jurisdiction* does not toll the statute of limitation." *Booth*, 522 F.3d at 1152; *accord Hairston v. Travelers Cas. & Sur. Co.*, 232 F.3d 1348, 1353 (11th Cir. 2000); *Bailey v. Carnival Cruise Lines, Inc.*, 774 F.2d 1577, 1581 (11th Cir. 1985).

The Fourth and Sixth Circuits take a somewhat more lenient approach. They hold that "as a general matter, the filing of an action in a court that *clearly* lacks jurisdiction will not toll the statute of limitations," but that equitable tolling may be available if the plaintiff adopts a "reasonable jurisdictional theor[y]," even if that theory is wrong. *Fox v. Eaton Corp.*, 615 F.2d 716, 719-720 (6th Cir. 1980) (emphasis added); *see Gibson v. Am. Bankers Ins. Co.*, 289 F.3d 943, 947-948 (6th Cir. 2002); *Shofer v. Hack Co.*, 970 F.2d 1316, 1319 (4th Cir. 1992) (expressly adopting this rule); *Woodson v. Allstate Ins. Co.*, 855 F.3d 628, 634 (4th Cir. 2017).

In other Circuits, however, "[e]quitable tolling is routinely held to be proper where, as here, a claimant filed suit in a venue without jurisdiction over the claim." *Sloan v. West*, 140 F.3d 1255, 1262 (9th Cir. 1998). The Ninth Circuit, for instance, has noted that "the presence or absence of subject matter jurisdiction" in the initial forum has little logical relevance to the availability of equitable tolling. *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1175 (9th Cir. 1986). Instead the

question is whether tolling would serve "[t]he purpose of the statute," and whether the plaintiff's misdirected filing in a particular case reflected appropriate "diligence" and gave adequate "notice to [the] defendant." *Ibid.*[1] If the answer to these questions is "yes," then denying equitable tolling based on technical jurisdictional issues would be just as arbitrary as denying it based on the technical transfer rules at issue in *Burnett*.

Other Courts of Appeals use a similar approach in practice. The Fifth Circuit's most recent decision on this issue held that equitable tolling was available for a misdirected filing regardless whether the initial forum had jurisdiction. *Granger v. Aaron's, Inc.*, 636 F.3d 708, 710-711, 713 (5th Cir. 2011). The Tenth Circuit has not formally articulated any rule on this topic, but it too has adopted a generous approach. *Loftis v. Chrisman*, 812 F.3d 1268, 1271-74 (10th Cir. 2016) (jurisdictionally time-barred appeal in state court supported equitable tolling for federal habeas claims). So does the Federal Circuit, at least as to requests for judicial

[1] The Ninth Circuit originally stated that it "agree[d] with the [Sixth Circuit's] analysis of the tolling issue," 801 F.3d at 1175, but its observations in *Valenzuela* about the rationale for equitable tolling apply whether or not the initial forum's jurisdiction is unclear. Apparently recognizing this, the Ninth Circuit's more recent decision in *Sloan v. West* applied equitable tolling even though the plaintiffs initially filed their claims in a forum that both applicable federal regulations and every other Court of Appeals to consider the issue had said lacked jurisdiction. *See* 140 F.3d at 1261-62.

review of administrative rulings. *See Jaquay*, 304 F.3d at 1288.

Until this case, the lower courts did agree about one thing. Whatever rules govern equitable tolling when a plaintiff files a timely pleading in the wrong *court*, those same principles apply to pleadings that are misdirected to an administrative agency. *See Sloan*, 140 F.3d at 1262 (limitations period was equitably tolled during filing's pendency in the Merit Systems Protection Board, despite the Board's lack of jurisdiction); *Nat'l Cement Co. v. Fed. Mine Safety & Health Review Comm'n*, 27 F.3d 526, 531 (11th Cir. 1994) (allowing equitable tolling where party "erroneously mailed his complaint to [the Mine Safety and Health Administration]"); *Granger*, 636 F.3d at 709-710, 713 (allowing equitable tolling for EEOC filing that was misdirected to the Office of Federal Contract Compliance Programs).

Most similar to the facts of this case is the Federal Circuit's treatment of a misdirected appeal from the denial of veterans' benefits. When a Veterans Affairs Regional Office denies benefits to a veteran, and he or she tries to appeal to the Court of Appeals for Veterans Claims but mistakenly sends the papers to the same Regional Office, the Federal Circuit holds "as a matter of law" that the mistaken filing can be eligible for equitable tolling. *Santana-Venegas v. Principi*, 314 F.3d 1293, 1298 (Fed. Cir. 2002); *Jaquay*, 304 F.3d at 1288-89.

C. This Court's Statements In *Menominee* Create Further Tension With Its Defective-Filing Precedents.

This confused landscape in the lower courts got even more confusing with this Court's recent decision in *Menominee Indian Tribe v. United States*, 136 S. Ct. 750 (2016).

Menominee involved the equitable-tolling standard that this Court first articulated in *Pace v. DiGuglielmo*, and that it has frequently applied in the past 15 years:

> Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.

544 U.S. 408, 418 (2005). To illustrate this proposition, the *Pace* Court cited to the same page of *Irwin* that noted the defective-pleading rule. *Ibid.*

Pace was a habeas-corpus case. As this Court noted in *Menominee*, it "ha[s] never held that [this] equitable-tolling test necessarily applies outside the habeas context." 136 S. Ct. at 756 n.2. But if it were to do so, the defective-pleading precedents could easily be read as compatible with this two-part test. A plaintiff who makes a timely filing often will have been diligent, and the filing's defect could, in appropriate cases, qualify as "extraordinary circumstances." The Court recognized as much in *Pace*, when it cited *Irwin* as illustrating this point.

But *Menominee* complicated matters. It also was not a habeas case, but the parties there agreed that the two-part *Pace* standard governed equitable tolling, and so the Court likewise assumed that it did. *Ibid.* The Court then elaborated on the "extraordinary circumstances" prong of the *Pace* test, holding that this standard "is met only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control." 136 S.Ct. at 756.

That rule is unproblematic in many factual contexts. But read literally, it is incompatible with this Court's holdings regarding timely but defective pleadings. *Menominee* did not involve a defective filing by the plaintiff, and so the Court's opinion did not discuss *Herb* or *Burnett.* But there can be no question that "filing a defective pleading during the statutory period," *see Irwin*, 498 U.S. at 96, is an error that usually is within the litigant's control. Filing a timely complaint in the wrong forum, as in *Herb* and *Burnett*, is almost *always* within the litigant's control. Yet this Court has repeatedly held that equitable tolling *can* be available in those circumstances.

D. Dennis Thompson Timely Seeks Judicial Review Of His Social-Security Case.

This case presents those circumstances. It involves Petitioner Dennis Thompson's application for Social Security disability benefits. Much of the record was compiled *pro se* by Petitioner and his wife. The record illustrates that his case has serious merit, both as

to the underlying claim for Social Security benefits and as to his claim for equitable tolling. It also illustrates how a stingy approach to equitable tolling in this context can have heartbreaking consequences.

First, the underlying claim for social-security benefits in this case has significant merit.

"In 2005, Dennis Thompson was diagnosed with a neurological disorder called transverse myelitis and other conditions." App.2. Thompson "and his wife were parenting their children, running a family business, and providing support for others living at their home or on their property." App.45. But that changed quickly. Thompson explained to the Social Security Administration that, as his transverse myelitis progressed, "he experienced bad days approximately fifteen of thirty days a month where he was unable to walk because of pain and had to stay in bed." App.39. His "pain and anxiety" also caused him "problems with concentration" and "difficulties with bowel and bladder control." *Ibid.*

Despite this, when Thompson applied for Social Security disability insurance benefits, the SSA denied his application. Testimony about the debilitating nature of Thompson's illness came not just from him, but from his nurse and social worker, from "several" of his doctors and health-care professionals, and from his "wife and their children." App.39, 49-50. The administrative law judge noted that Thompson's description (and the other evidence) matched the kinds of symptoms that would be medically expected from

transverse myelitis and his other conditions. App.40. Nonetheless, the ALJ concluded that "the intensity, persistence and limiting effects of [Thompson's] symptoms" must actually be far less than Thompson and his witnesses said. *Ibid.* As a result, the ALJ concluded that Thompson "was not disabled." App.54.

The Social Security Appeals Council denied Thompson's appeal, without opinion. App.14. Pursuant to § 405(g), Thompson then had 60 days to seek judicial review by filing a complaint in the District Court.

Second, Thompson gave the SSA full notice of his claims by filing a complete pleading before the statutory deadline. The filing was defective only because it was sent to the wrong address.

Because of Dennis Thompson's condition, his wife Ann Rooney Thompson took charge of filing the complaint. Aff. of Ann Rooney Thompson, D.Minn. Dkt. 12 ¶ 1. On his behalf, Ann first requested from the SSA and "received a thirty-day extension of time," "until December 18, 2015, to file an action in [the] local United States District Court." App.3-4.

On December 10, Ann shipped a *pro se* complaint seeking judicial review of the SSA's denial of benefits. App.4. As the Court of Appeals noted, on the document's face, there was no ambiguity about the relief it was seeking: it "began, 'Dear Appeals Court, I am writing to respectfully disagree and appeal your decision regarding my disability and social security benefits.'" *Ibid*. Nor was the filing insubstantial: including exhibits, it totaled 180 pages. D.Minn. Dkt. 18 at 1.

But Ann made a mistake. She meant to send the complaint to the United States District Court for the District of Minnesota, but she sent it "to the wrong address for the Social Security Administration inadvertently." D.Minn. Dkt. 12 ¶ 6. The SSA received the complaint, and on January 6, 2016 sent a letter to Dennis stating that it would take no action on it. *Id.* ¶ 7. At that point Ann first realized "that I had sent the appeal to the wrong address." *Ibid.* She "immediately ... called the [SSA]" asking for "a few days" to send the complaint to the correct address, and sent a letter to the same effect. *Id.* ¶¶ 8-9.

These are precisely the circumstances that the SSA has identified, by regulation, as likely warranting an extension—Ann "sent the request" for judicial review "to another Government agency in good faith within the time limit." 20 C.F.R. § 404.911(b)(8); *see id.* § 404.982. But the SSA never granted any additional time. In the ensuing weeks, Ann "went back and forth with the Administration after it repeatedly told her to wait until her December documents were 'upload[ed] into the system.'" App.5 (alteration in original). Ann's fax and repeated phone calls to the SSA elicited only repeated instructions to call back in 30 days. D.Minn. Dkt. 12 ¶¶ 9-11. Finally, Ann decided that she could wait no longer and so re-filed the *pro se* complaint in the District of Minnesota on April 18, 2016. *Id.* ¶ 11; App.5.

Third, the District-Court record sets forth the severe impact that the lack of Social-Security benefits has had on Petitioner and his family. Dennis's lack of

income and mental condition have created extreme financial and emotional challenges for Ann and their children. *E.g.*, D.Minn. Dkt. 18 at 2. Ann's initial filings explained how this "ruined an otherwise healthy happy family," as well as their "marriage and small business." D.Minn. Dkt. 12-1 at 2, 11. "Three of four children suffer with depression, the small family business is ground down to a few loyal customers. The homestead is being sold, and divorce is being mediated." *Id.* at 11. The Thompsons' children were left "see[ing] their Dad soon to be homeless with no income," and wondering "why would God allow this to happen." *Id.* at 2.

Later, Dennis himself explained things in a handwritten letter to the District Court:

> my wife Ann ... has worked tirelessly + endlessly on my behalf. **** She has reached the end of her rope, + a separation, then divorce is imm[i]n[e]nt. After that my living situation will be unclear.

D.Minn. Dkt. 19 at 1-2.

E. The Eighth Circuit Denies Equitable Tolling, Joining The Courts Of Appeals That Require The Initial Forum To Have Jurisdiction.

In the District Court, the Commissioner moved to dismiss Thompson's claims as untimely. The government admitted that equitable tolling was available, but argued that the court should not exercise its discretion to apply it. The District Court noted that "the

filing was not made within the statute of limitations because [Ann] inadvertently sent the filing to the wrong address." App.11. The court added that it "is sympathetic to Ms. Thompson," but stated that it could not help her because "it does not have jurisdiction over a time barred case." *Ibid.*

The parties agree that this conclusion was error. As this Court has explained, Section 405(g)'s deadline "is not jurisdictional" and is subject to "traditional equitable tolling principle[s]." *Bowen*, 476 U.S. at 478, 480. After the District Court dismissed Thompson's claims, on appeal the Eighth Circuit "appointed counsel for Thompson and ordered briefing on whether he was entitled to equitable tolling." App.5. The Court of Appeals ultimately held, however, that he was not.

The panel applied the two-prong habeas test from *Pace* and *Holland*. On the first prong, the panel noted that "[t]he Commissioner does not dispute that Thompson diligently pursued his rights." App.6. The issue therefore turned on the second prong: "whether an 'extraordinary circumstance' kept Thompson from timely filing an action in the district court." *Ibid.* On that question, the Eighth Circuit applied *Menominee*'s rule that "the circumstances that caused a litigant's delay [must be] both extraordinary *and* beyond its control." *Ibid.* Since "sending the appeal to the wrong place" was not beyond Thompson's control, the panel found that "[t]here was no external obstacle that prevented a timely filing" and he therefore was ineligible for equitable tolling. App.6-7.

The panel acknowledged this Court's decisions in *Burnett* and *Herb*, allowing equitable tolling where a litigant made a timely filing in the wrong forum. The Eighth Circuit had previously applied these precedents to allow equitable tolling for a mistaken state-court filing. *Billings v. Chicago, R. I. & P. R. Co.*, 581 F.2d 707, 709-710 (8th Cir. 1978). But since that is incompatible with the "external obstacle" rule that the panel believed was controlling, it construed *Burnett* and *Herb* as narrowly as possible. It suggested that those decisions did not apply to "the Social Security Act," and held that they do not apply to "a situation like this one under § 405(g), where federal courts have exclusive jurisdiction over a claim, and the complainant mistakenly corresponds with an agency rather than a court of competent jurisdiction." App.7.

The panel did not attempt to explain why there should be such dramatically different treatment for a timely filing in a forum without jurisdiction and a timely filing in an improper venue. The Eighth Circuit simply declared that the former, but apparently not the latter, "is at best a garden variety claim of excusable neglect for which equitable tolling is unavailable." App.8.

The Eighth Circuit denied Thompson's timely petition for rehearing. App.55. This Petition follows.

REASONS FOR GRANTING THE WRIT

The Court should grant review to resolve two deep and problematic conflicts in the caselaw. First, as explained above, *Menominee*'s "external obstacle" rule is incompatible with the Court's previous decisions allowing equitable tolling for defective pleadings. The Court should grant review to clarify that those precedents have not been implicitly overturned. Without that guidance, the Courts of Appeals will be left to guess how to reconcile the Court's decisions—and they often will do so by drawing artificial and largely senseless distinctions, as the panel did here.

Second, the Court should resolve the long-standing and entrenched conflict between the Circuits regarding whether, under *Herb* and *Burnett*, equitable tolling is available only when the initial forum had (or might have had) jurisdiction. There is no narrowing or resolution of this split in sight. And despite the longstanding nature of this conflict, no court has articulated any reason why the jurisdictional inquiry should be relevant to equitable tolling.

I. This Court Should Resolve The Tension Between *Burnett* And *Menominee*, And The Confusion In The Lower Courts.

There's no avoiding the basic problem. *Menominee* instructs "that the second prong of the equitable tolling test is met only where the circumstances that caused a litigant's delay are ... beyond its control." 136 S. Ct. at 756. But this Court has repeatedly held that a

timely but "defective pleading" can sometimes warrant equitable tolling, *Irwin*, 498 U.S. at 96 (citing *Burnett*, 380 U.S. 424; *Herb*, 325 U.S. 77)—and pleading defects are *not* beyond the litigant's control. Something has to give.

There are two realistic paths to resolving this tension. One possibility would be to decide that the *Burnett* line of cases must be overruled, and that *Menominee*'s "beyond its control" rule applies to every instance of equitable tolling. The other, better possibility is that the "beyond its control" rule does not apply to defective-filing cases. There is no other clear option. And this Court must be the one to choose which path is the best. The lower courts have not, and cannot, come to any consensus resolution on their own.

Of course, any overruling of the defective-pleading cases could come only from this Court. The Courts of Appeals cannot discard those precedents on the ground that they "appear[] to rest on reasons rejected in some other line of decisions," but must "leav[e] to this Court the prerogative of overruling its own decisions." *E.g.*, *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). Thus, if the lower courts believe that the *Menominee* "beyond its control" rule applies by its terms to all equitable-tolling cases, they will be forced to narrow the defective-pleading precedents by drawing essentially arbitrary distinctions.

That is what the Eighth Circuit panel did here. The panel brushed aside *Burnett* by reciting a list of

differences between it and this case, without explaining how any of those differences could be material. The panel noted that this case involves the Social Security Act, not the FELA—but it gave no reason why the different statutes should lead to different results. App.7. It observed that Thompson misdirected his filing to an administrative agency rather than a court —but it neither explained why *that* mattered, nor grappled with the many decisions from other Courts of Appeals that, in this context, treat misdirected agency filings the same as misdirected court filings. *Compare* App.7 *with supra* p.11. Finally, while the panel's observation that "federal courts have exclusive jurisdiction" over Thompson's claim (App.7) does at least accord with some other Circuits' decisions, *see supra* p.9, neither the Eighth Circuit here nor any other Court of Appeals has explained why the initial forum's jurisdiction should determine the equitable-tolling question.

In short, if *Burnett* and the other defective-pleading precedents are to be overruled, it should be done directly by this Court, not in the piecemeal and arbitrary manner of the decision below.

On the other hand, if the defective-pleading cases are to remain good law, then only this Court can settle when they apply. As described above, every Court of Appeals to have considered the question has held that *Burnett* allows equitable tolling for some defective pleadings—but they have taken at least three different positions as to *which* defective pleadings qualify. *Supra* pp.9-10. If *Burnett* remains good law, then that three-way disagreement persists as well. The Eleventh

Circuit describes its rigid jurisdictional requirement as "our circuit's well-settled principle," *Booth*, 522 F.3d at 1152, the Eighth Circuit adopted that same rule in this case, and there is no sign of the other Circuits receding from their contrary positions.

To summarize: If *Burnett* must go, then this Court is the only one that can properly send it off. And if *Burnett* may stay, then only this Court can clarify on what terms and within what bounds. Either way, this Court's review is necessary.

II. This Case Is The Right Vehicle To Resolve These Conflicts.

This case is an ideal vehicle to clarify the relationship between *Menominee* and *Burnett*, because it presents the Court with all possible options for doing so.

First, this case is similar to *Burnett* in a crucial way. The *Burnett* Court, in allowing equitable tolling for defective filings, relied heavily on FELA's "humane and remedial" nature." 380 U.S. at 427. It held, for instance, that "the humanitarian purpose of the FELA makes clear that Congress would not wish a plaintiff deprived of his rights when no policy underlying a statute of limitations is served in doing so." *Id.* at 434. The Social Security Act is similar. This Court has already held that its "statute of limitations ... is contained in a statute that Congress designed to be 'unusually protective' of claimants." *Bowen*, 476 U.S. at 480; *accord Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019).

This is the perfect degree of similarity to *Burnett* to allow the Court a full range of choices. A case that did not involve a specially protective statute would not be similar enough—it would make it difficult to overrule *Burnett*, if the Court were inclined to do so, because it would be distinguishable on that ground. On the other hand, a FELA case would be *too* similar to *Burnett*—if the Court wishes to reaffirm its defective-filing precedents, such a case would present little occasion to clarify whether they apply outside the FELA context. But this case, involving a non-FELA statute that still is "unusually protective" of claimants, will allow the Court to fully resolve the defective-filing precedents' relationship with the two-part habeas test for equitable tolling.

Finally, this case's factual and procedural backgrounds also make it an ideal vehicle. As described above, Petitioner has a significant claim on the merits for Social Security benefits. Moreover, there is no dispute that he pursued his judicial remedy with diligence, and even the district court was "sympathetic" to his plea for lenience. App.11. If equitable tolling does apply, the Commissioner has never disputed that Thompson's district-court complaint would be timely. And finally, after the late filing caused by an honest *pro se* mistake, Petitioner now has court-appointed counsel to assist in presenting the case to this Court. That confluence of circumstances makes this the right case for the Court to address the important question presented.

III. The Court Should Re-Affirm The Availability Of Equitable Tolling For Timely But Defective Filings.

Certiorari is also warranted because, although only this Court can settle the relationship between *Burnett* and *Menominee*, the best path to do so is not hard to see. The Court should clarify that, when its previous decisions have identified circumstances supporting equitable tolling that do not involve an "external obstacle," *Menominee* did not implicitly overturn those decisions and the "external obstacle" requirement does not apply to those circumstances. From there, the Court should clarify that filing a claim in the wrong forum can warrant equitable tolling, regardless of the initial forum's jurisdiction over the case.

First, *Menominee* should not be read as implicitly overturning this Court's "defective filing" precedents. As the Court has recognized elsewhere in the equitable-tolling context, "[c]ourts do not normally overturn a long line of earlier cases without mentioning the matter." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137 (2008).

That rule makes good sense here. Applying the "external obstacle" requirement to *every* application of equitable tolling—or even to every defective-pleading case—would have far-reaching and troublesome consequences. Most prominently, it would call into question class-action tolling under *American Pipe*. "[T]his Court has [repeatedly] referred to *American Pipe* as 'equitable tolling,'" *California Pub. Employees' Ret. Sys. v.*

ANZ Sec., Inc., 137 S.Ct. 2042, 2052 (2017) (collecting cases), including just last Term. *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1809 (2018) (referring to "*American Pipe*'s equitable-tolling exception to statutes of limitations"). Indeed the *Irwin* Court cited *American Pipe*, along with *Herb* and *Burnett*, as an example of defective-pleading tolling. 498 U.S. at 96 & n.3. But *American Pipe* "did not analyze ... whether the plaintiffs pursued their rights with special care [or] whether some extraordinary circumstance prevented them from intervening earlier." *California Pub. Employees' Ret. Sys.*, 137 S.Ct. at 2052. It certainly did not analyze whether the extraordinary circumstance was beyond the plaintiffs' control. Of course, neither *Herb* nor *Burnett* did so either. *Menominee* gave no indication that it was undoing these precedents *sub silentio*, and the Court should confirm that it did not.

Nor is there any sound reason to discard the Court's defective-pleading decisions. Rather, they can fit comfortably into both the general rationale for equitable tolling and the two-prong *Pace* test. "Equitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to pursue his rights diligently, and when an extraordinary circumstance prevents him from bringing a timely action, the restriction imposed by the statute of limitations does not further the statute's purpose." *CTS Corp. v. Waldburger*, 573 U.S. 1, 10 (2014) (brackets, quotation marks, and citation omitted). In that light, a timely but defective filing can easily qualify as diligence plus an "extraordinary circumstance." The plaintiff has put in all the effort needed to file timely claims,

and the defendant has been put on full notice of the claims. The interests protected by a limitations period have been fully served, and so if the other circumstances warrant tolling, there is no reason to bar the claims if the plaintiff promptly re-files them in the correct forum. The Court therefore should hold that its defective-pleading precedents, including *Burnett*, continue to apply with full force after *Menominee*. If the Court has any hesitation about reaffirming the defective-pleading rules for equitable tolling generally, it at least should confirm that those rules continue to apply to limitations periods in statutes that are especially "humanitarian" or "unusually protective of claimants," like FELA and the Social Security Act. *Compare Burnett*, 380 U.S. at 434, *with Bowen*, 476 U.S. at 480.

Finally, the Court should further clarify that the jurisdictional nature of a filing's defect does not necessarily preclude equitable tolling. The Courts of Appeals have long been split on this point, *see supra* pp.9-10, but none of them has articulated any reason—let alone a good reason—why the initial forum's jurisdiction should control the equitable-tolling analysis. Again, the purposes of a limitations period are ensuring diligence by the plaintiff and timely notice of the claims to the defendant. Whether the initial forum had jurisdiction has little direct impact on either of those issues.[2]

---

[2] Nor does it make any difference whether the initial forum *clearly* lacked jurisdiction, as the Fourth and Sixth Circuits inquire. *See supra* p.9. That test does little to further the policies either of limitations periods or of equitable tolling. Even a pleading with a "clear" jurisdictional defect still gives the defendant timely notice of the plaintiff's claims, and still generally will

If the filing gives the defendant adequate and timely notice that the plaintiff is asserting a claim against it, and if the plaintiff promptly corrects the filing error when it is discovered, then those purposes are satisfied regardless of the initial forum's jurisdiction.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

September 19, 2019

JEFFREY P. JUSTMAN
Counsel of Record
NICHOLAS J. NELSON
ROBERT C. GALLUP
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Ctr.
90 S. Seventh St.
Minneapolis, MN 55402
(612) 766-7000
jeffrey.justman@faegrebd.com

Counsel for Petitioner
Dennis Thomas Thompson

require the defendant to file an appearance and move for dismissal. Moreover, under such a rule defendants could not reasonably rely on the limitations bar, because even if a defendant *believes* that the jurisdictional defect is "clear"—or, conversely, that the plaintiff has no "reasonable theory" to support the forum's jurisdiction—it often will not know whether the courts will agree until it litigates the issue. Finally, in this context there is no functional difference between a clear jurisdictional defect and a clear venue defect requiring dismissal, so there is no practical reason for making that distinction the dispositive one.