No. 19-376

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

REPLY IN SUPPORT OF CERTIORARI

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Respondent SSA all but concedes that the Question Presented warrants certiorari. It recognizes the unresolved tension between this Court's defective-pleading decisions and *Menominee*'s "beyond its control" requirement. And it does not deny the Circuit split on whether defective-pleading tolling can be available when the defect is jurisdictional. Nor does the SSA suggest that either of these conflicts is somehow unworthy of the Court's attention.

Instead, the SSA opposes certiorari based solely on vehicle arguments that are demonstrably wrong and immaterial. Its attempts to contrive a distinction between this case and *Burnett* only illustrate the problems caused by the confusion in the caselaw. The SSA's first contention—that its written instructions to Mr. Thompson somehow preclude defective-pleading tolling—finds no footing in the precedents, in the rationale of the defective-pleading doctrine, or in general equitable-tolling principles. And its second contention—that Mr. Thompson's *pro se* filing was too unclear to qualify as a defective pleading for purposes of equitable tolling—is disproved by the record and in any event is no barrier to this Court's consideration of the Question Presented.

Finally, the SSA's contention that Mr. Thompson did not raise the Question Presented below is spurious. Mr. Thompson's Eighth Circuit brief expressly argued that, under this Court's decisions in *Herb* and *Burnett*, filing a defective pleading satisfies the "extraordinary

circumstances" prong of the *Pace* test. That is the Petition's central contention. Moreover, the SSA's principal counterargument in the Court of Appeals was that *Menominee* forecloses that position. The parties discussed *Menominee* extensively at oral argument in the Eighth Circuit, and the Court of Appeals plainly decided the question in its opinion.

This Court should grant certiorari to resolve the inconsistency between its own equitable-tolling decisions, and between the decisions of the Courts of Appeals.

I. Respondent Does Not Dispute That The Question Presented Warrants Certiorari.

A. This Court Must Reconcile the Defective-Pleading Doctrine with *Menominee*'s "Beyond its Control" Rule.

The Petition explains (at 21) that "[t]here's no avoiding the basic problem:" this Court's defective-pleading precedents, which allow equitable tolling for filings in the wrong forum, are incompatible with *Menominee*'s "beyond its control" standard. Sure enough, the SSA does not deny that basic problem. In fact, it admits that the Court's defective-pleading decisions either do not implicate the diligence-plus-extraordinary-circumstances test at all (BIO 4) or else "d[o] not specifically find that the incorrect filing had been due to circumstances outside the plaintiff's control" (*id.* at 5). Thus, the SSA appears to concede that *Menominee* is facially at odds with defective-pleading tolling,

including *American Pipe* class-action tolling as well as the more classic form at issue here. And although the SSA suggests that at least part of the defective-pleading doctrine must survive *Menominee* (BIO 15), it does not explain how the two standards can be reconciled—since pleading defects are usually within the pleader's control.[1] The Court should grant certiorari to resolve this undisputed tension between its own decisions.

Indeed, the SSA's attempts to avoid certiorari only highlight why resolving this tension is important. The Petition explained (at 22-23) how following *Menominee* requires the lower courts to narrow the defective-pleading decisions using arbitrary and superficial distinctions. The Brief in Opposition repeats that error.

Seeking to contrive a distinction between this case and the defective-pleading precedents, the SSA explains at length that it "told petitioner that he could 'ask for court review * * * by filing a civil action.'" BIO 6 (quotation marks and citation omitted). Although the SSA did not tell Mr. Thompson the name or address of the court he should file in, it insists that this case differs from the defective-pleading precedents because Mr. Thompson supposedly "overlook[ed] the directions

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[1] To be sure, one could imagine unusual fact patterns where a filing goes to the wrong forum due to factors beyond the plaintiff's control—for example, someone giving a plaintiff incorrect information about where to file, or the Post Office misdirecting a correctly-addressed filing. But the defective-pleading precedents generally have not involved, and certainly are not limited to, such unusual facts.

that SSA sent to [him], despite those directions being clear and repeated." BIO 11 (quotation marks and citation omitted); *see id.* at 12-14, 15, 16, 17-18. But that superficial distinction finds no footing in the caselaw or in good sense. Although agencies often advise parties that they can seek judicial review of an adverse action, the SSA identifies no decision from any court that has held this to create an exception to the defective-pleading doctrine. Nor does it explain how where-to-file-suit instructions *could* sensibly change the outcome of the "beyond its control" inquiry, which the SSA says is the relevant test here. Whether or not someone advises a plaintiff where to file his complaint, the plaintiff still has "control" over where he sends it.

This illustrates the basic problem: in cases like this one, it is not possible for the lower courts to fully follow both *Burnett* and *Menominee*. Instead they must set aside or arbitrarily narrow one or the other of this Court's decisions. The Court can end that difficulty by granting certiorari and clarifying the law.

B. This Court Must Resolve the Circuit Split Over the Effect of Jurisdiction on the Defective-Pleading Doctrine.

Just as the SSA does not deny the tension between *Burnett* and *Menominee*, it also does not contest that the Courts of Appeals are split three ways on the scope of the defective-pleading doctrine. As the Petition explained (at 9-12), some Circuits hold that filing in a forum without jurisdiction absolutely bars equitable

tolling; others allow equitable tolling only if the plaintiff had a reasonable jurisdictional argument; and others yet find the initial forum's jurisdiction irrelevant to the tolling analysis. The SSA does not deny that this split exists. *See* BIO 15-18. Nor does it gainsay that the split is well-developed and shows no sign of resolving itself. *See* Pet. 23-24.

The Petition also observed that no "Court of Appeals has explained *why* the initial forum's jurisdiction should determine the equitable-tolling question." Pet. 23 (emphasis added). Respondent has not offered any such explanation, either, and it is difficult to think of one that is even plausible. Under this Court's decisions, a timely filing in the wrong forum can support equitable tolling because it shows that the plaintiff has been diligent and because it gives adequate notice to the defendant. Whether the forum defect is jurisdictional in nature has no direct bearing on those considerations. It therefore is not properly an element of the equitable-tolling inquiry.

Happily, that principle is easily compatible with the two-part *Pace* test for equitable tolling. A plaintiff who files the correct pleading within the required time has satisfied the first *Pace* requirement, diligence. And the plaintiff's sending the filing to the wrong forum qualifies as "extraordinary circumstances." It certainly is not "ordinary" for people to go to the trouble of drawing up timely legal filings only to send them to the wrong place. Moreover, since a plaintiff gains nothing by making this kind of mistake—not even extra time to draft the filing—there is little risk that allowing

equitable tolling in these circumstances would somehow incentivize anyone to do so. And that is true regardless whether the forum defect goes to jurisdiction or merely to venue.

II. Respondent's Alternative Argument Is No Barrier To Certiorari.

The SSA's next objection to certiorari is to suggest an alternative ground for affirmance. It appears to contend that—no matter how this Court resolves the confusion in the caselaw—Mr. Thompson could not qualify for equitable tolling because his misdirected *pro se* complaint "did not ... clearly indicate that he wanted to pursue *judicial* review." BIO 12. Therefore, says the SSA, Mr. Thompson did not give it the timely notice of his claim that defective-pleading tolling requires. The argument is wrong on the merits, is incompatible with the SSA's position in the Court of Appeals, was not addressed by the courts below, and—most importantly—is no barrier to this Court's review of the Question Presented but is simply an additional issue that perhaps could be raised on remand.

First, the SSA is simply mistaken to argue that Mr. Thompson "did not ... clearly [seek] *judicial* review." BIO 23. To the contrary, that is the most reasonable interpretation of his actions. After the SSA's final decision, Mr. Thompson's wife first requested from the SSA, and received, an extension to December 18 of the time "within which you may file a civil action (ask for court review)." D.Minn. Dkt. 9-3 at 1. Then, just before

that deadline for court filing—on December 10 and 14, respectively—she sent a lengthy filing (with exhibits) and a supplemental letter. Both documents began with the words, "**Dear Appeals Court**." D.Minn. Dkt. 1-1 at 1, 5 (emphasis added). Moreover, Mrs. Thompson "urge[d] **the appeals court** to please consider doing what is in the best interest of this man," described how Mr. Thompson would benefit "[i]f **the court** approved ... SSDI," and asked "that **the appeals court** will show compassion and mercy." *Id.* at 6-7 (emphases added). By contrast, nothing in either filing requested any action or review by the SSA. Its alternative argument thus lacks substantive merit.

Second, this argument is incompatible with the way both parties litigated the case below. The SSA told the Eighth Circuit that under the *Pace* test for equitable tolling, "[t]he first element—diligence—covers those affairs within the litigant's control." Def.'s Supp. CA8 Br. at 5 (quotation marks and citation omitted). The content of Mr. Thompson's filings plainly was within his control. So, if the SSA believed the filings did not adequately request judicial review, it should have argued below that Mr. Thompson had not been diligent. But it did not do that—instead the SSA "did not dispute petitioner's diligence" (BIO 9; *see* App.6 ("The Commissioner does not dispute that Thompson diligently pursued his rights")), and argued only that sending the pleading to the wrong address did not qualify as extraordinary circumstances.

Third and most importantly, even if the SSA's argument about the sufficiency of Mr. Thompson's timely

filing had some potential merit, it simply does not amount to a vehicle problem. Neither the district court nor the Court of Appeals considered this issue. Instead the Eighth Circuit decided the appeal on the grounds presented by the Petition: that *Menominee* controls, and that this Court's defective-pleading precedents do not apply to filings in a forum that lacks jurisdiction. App.6-8. As a result, this Court can decide those issues without considering the SSA's alternative argument.

III. Mr. Thompson Expressly Argued Below That Defective Pleadings Satisfy *Pace*'s "Extraordinary Circumstances" Requirement.

Finally, the SSA complains that "Petitioner's counseled brief to the court of appeals did not even cite *Menominee*," and suggests that therefore the issue of "how that precedent impacts defective-pleading cases like *Burnett*" was "not raised or litigated in the lower courts." BIO 14 (citation omitted). That is soundly wrong. The interplay between *Burnett* and *Menominee* was thoroughly discussed in the Court of Appeals.

The SSA concedes that in the Eighth Circuit, "petitioner's contention" was "that his letters to SSA ... qualified as 'extraordinary circumstances' that warranted equitable tolling [pursuant to] the defective-pleading cases, *Burnett* and *Herb.*" BIO 9. That is correct. Mr. Thompson's counseled supplemental brief in the Eighth Circuit expressly argued (at 19) that, under *Burnett*, "it is extraordinary that Mr. Thompson timely appealed, but merely sent his appeal to the

wrong address." Therefore, Mr. Thompson argued, *Pace*'s requirement of "extraordinary circumstances" was satisfied. *Ibid.* That is exactly the same position that the Petition now advances in this Court.

As for *Menominee*'s impact on *Burnett*, it was the SSA that raised that issue in the Eighth Circuit—very prominently. After Mr. Thompson filed his supplemental brief, the Court of Appeals allowed the SSA to file an additional brief as well. That brief relied primarily (and for the first time) on *Menominee*. The brief listed *Menominee* as the sole case in its "Statement of the Issue," again cited only *Menominee* (twice) in its "Summary of the Argument," and referred to *Menominee* by name on each of its first seven pages. *See* Def.'s Supp. CA8 Br. at 1-7. Moreover, the SSA specifically argued that the defective-pleading precedents do not apply because they "do not acknowledge the *Holland*/*Menominee* two-element test for equitable tolling," *id.* at 6, and that under *Menominee*, "filing in the wrong forum" cannot be an "extraordinary circumstance" "unless it was caused by forces beyond [the filer's] control." *Id.* at 7.

Mr. Thompson was not allowed an additional brief to respond to those arguments, but the issue received lengthy discussion at oral argument. One of the first questions that the panel asked Mr. Thompson's counsel was on precisely the issue that the SSA now says was not litigated below:

> *Burnett* and ... *Irwin* ... do say what you say. But doesn't *Menominee* ... change this

> around and make very clear that it's gotta clearly be extraordinary circumstances **beyond** your client's control?[2]

After some discussion, Mr. Thompson's counsel stated exactly the position that the SSA denies he raised below: "[*Menominee*] has no effect on *Burnett*."[3]

And of course, the Eighth Circuit's opinion in this case expressly found *Menominee* to be controlling. App.6-7.[4] It purported to distinguish *Herb* and *Burnett* by reciting a list of superficial differences, without explaining why any of them matter. *See* App.7-8; Pet. 22-23.

In short, the SSA is correct that Mr. Thompson's Eighth-Circuit brief "embraced the general two-element equitable tolling standard from *Pace*." BIO 11 (quotation marks, citation, and alteration omitted). The Petition for Certiorari does the same. *E.g.*, Pet. 27 ("the Court's defective pleading decisions" "can fit comfortably into ... the two-prong *Pace* test"). The SSA countered, and the Eighth Circuit held, that *Menominee*'s "beyond its control" standard is part and parcel of the *Pace* test, even in defective-pleading cases like this one. But Mr. Thompson certainly never "embraced" *that* proposition. Quite the opposite: he has consistently

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[2] CA8 argument audio, http://media-oa.ca8.uscourts.gov/OAaudio/2018/10/172111.MP3, at 3:10-3:30.

[3] *Id.* at 5:11-14.

[4] Although the most relevant paragraph of the Eighth Circuit's opinion refers to *Pace* by name, both of the quotations in that paragraph are from *Menominee*, which the Court of Appeals opinion cited at the end of the preceding paragraph. *See* App.6.

argued that a wrong-forum filing *does* count as extraordinary circumstances under *Burnett*, and that *Menominee* does not change that.

The Petition presents that question, and the SSA does not dispute that it warrants certiorari. The Court should grant the writ and resolve this important issue.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

December 20, 2019

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