No. 19-376

In the Supreme Court of the United States

DENNIS THOMAS THOMPSON, PETITIONER

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
LEWIS S. YELIN
JOSHUA DOS SANTOS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner—who missed the 60-day statutory deadline under 42 U.S.C. 405(g) for filing a civil action for judicial review in federal district court of the Social Security Administration's (SSA) decision denying his claim for benefits—is entitled to equitable tolling of that deadline based on two letters that he sent to SSA within the 60-day period, which the agency understood as a request for further administrative review.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Regulations—Continued: Page

In the Supreme Court of the United States

No. 19-376

DENNIS THOMAS THOMPSON, PETITIONER

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 919 F.3d 1033. The order of the district court (Pet. App. 10-11) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2019. A petition for rehearing was denied on May 22, 2019 (Pet. App. 55). On August 12, 2019, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including September 19, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to

provide monetary benefits to certain disabled individuals under Titles II and XVI of the Act. Title II, 42 U.S.C. 401 *et seq.*, establishes an "insurance program," known as Social Security Disability Insurance (SSDI), that provides "disability benefits to insured individuals irrespective of financial need." *Bowen* v. *Galbreath*, 485 U.S. 74, 75 (1988). Title XVI, 42 U.S.C. 1381 *et seq.*, establishes a separate social "welfare program" that provides supplemental-security-income (SSI) benefits "to financially needy individuals who are aged, blind, or disabled regardless of their insured status." *Galbreath*, 485 U.S. at 75.

To receive benefits, a claimant must file an application with SSA. See 20 C.F.R. 404.603 (SSDI); 20 C.F.R. 416.305 (SSI). If the agency denies a claim for benefits, the claimant may seek further review within the agency through a multi-step administrative process, and may thereafter seek judicial review. See 20 C.F.R. 404.900(a)(1)-(5) (SSDI); 20 C.F.R. 416.1400(a)(1)-(5) (SSI). The claims process begins with an "[i]nitial determination," which may be followed by "[r]econsideration," a hearing before an administrative law judge (ALJ), and then review by the SSA Appeals Council (a body within SSA that has discretion to review ALJ decisions). 20 C.F.R. 404.900(a)(1)-(4), 416.1400(a)(1)-(4) (emphases omitted); see *Bowen* v. *City of New York*, 476 U.S. 467, 471-472 (1986). Once the Appeals Council either issues a decision or denies review, the agency's decision is final. 20 C.F.R. 404.981, 416.1481.

The Social Security Act provides for judicial review of final decisions made after a hearing. 42 U.S.C. 405(g). To obtain judicial review, a claimant must commence a civil action "within sixty days after the mailing to him of

notice of [the agency's final] decision or within such further time as [the agency] may allow." *Ibid.* (Title II proceedings); see 42 U.S.C. 1383(c)(3) (incorporating Section 405(g) for judicial review in Title XVI proceedings). The agency exercises its authority to grant extensions of time to seek judicial review when a claimant shows good cause, such as a serious illness or death in the claimant's family. 20 C.F.R. 404.911(a)-(b), 404.982, 416.1411(a)-(b), 416.1482. Absent an extension authorized by the agency, the statutory 60-day filing deadline usually bars untimely suits. See *City of New York*, 476 U.S. at 481. But the time limit is not jurisdictional. *Id.* at 478. And like many statutes of limitations, the filing deadline in Section 405(g) may be equitably tolled in certain circumstances. See *id.* at 480-481.

b. To obtain "equitable tolling" of a statute of limitations, a litigant generally "bears the burden of establishing two elements." *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005). First, the litigant must show that he "has been pursuing his rights diligently." *Ibid.* Second, he must establish "that some extraordinary circumstance" that is "beyond [his] control" has "stood in his way and prevented timely filing." *Menominee Indian Tribe* v. *United States*, 136 S. Ct. 750, 755-756 (2016) (quoting *Holland* v. *Florida*, 560 U.S. 631, 649 (2010)) (citation omitted). When a litigant makes those showings, a court may excuse a plaintiff's otherwise untimely filing. See *Holland*, 560 U.S. at 649; cf. *Menominee*, 136 S. Ct. at 756 n.2 (reserving judgment on whether the equitable tolling standard described in *Pace*, which was a habeas case, should be stricter outside the habeas context).

Courts permit equitable tolling "only sparingly," *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89,

96 (1990), because neither courts nor defendants should be forced to "try[] stale claims when a plaintiff has slept on his rights," *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 428 (1965). That principle applies with particular force when the defendant is an agency like SSA, which Congress sought to protect from "belated litigation of stale eligibility claims." *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977) (rejecting an interpretation of Social Security Act's statute of limitations that would allow claimants to seek judicial review of the denial of a motion to reopen after the statutory period for judicial review of the agency's final decision denying benefits has expired). SSA must necessarily rely on the applicable statutes of limitations for "speedy resolution" of lawsuits that might arise from the "millions of claims" that it annually processes. *City of New York*, 476 U.S. at 481.

The circumstances in which this Court has found equitable tolling of a statute of limitations are limited. See, *e.g.*, *Young* v. *United States*, 535 U.S. 43, 50 (2002). For example, the Court has held that the filing of a class action tolls the statute of limitations for purported members of the class, so long as they timely intervene or file a separate action after the district court declines to certify the class. See *China Agritech, Inc.* v. *Resh*, 138 S. Ct. 1800, 1806 (2018); *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 553-554 (1974). Under the *American Pipe* doctrine, a purported class member need not demonstrate either diligence or extraordinary circumstances to benefit from equitable tolling. See *California Pub. Employees' Ret. Sys.* v. *ANZ Sec., Inc.*, 137 S. Ct. 2042, 2052 (2017).

This Court has also allowed equitable tolling when a plaintiff files a lawsuit on time, but in the wrong court. See *Irwin*, 498 U.S. at 96 ("We have allowed equitable

tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period.") (citing *Burnett*, 380 U.S. at 434, and *Herb* v. *Pitcairn*, 325 U.S. 77, 78-79 (1945)). In those so-called "defective pleading" cases, *ibid.*, the timely filing of the lawsuit "itself shows the proper diligence on the part of the plaintiff which . . . statutes of limitation were intended to insure," *Burnett*, 380 U.S. at 430 (citation omitted). And by filing the lawsuit and serving process, the plaintiff notifies the defendant of his intent to pursue his claim in court. *Id.* at 429-430. In *Burnett*, this Court permitted equitable tolling of a statute of limitations based on the plaintiff's act of filing his lawsuit in a state court that was the incorrect venue. *Id.* at 434-435. The Court did not specifically find that the incorrect filing had been due to circumstances outside the plaintiff's control.

2. Petitioner applied for SSDI benefits in September 2013, and for SSI benefits soon thereafter. Pet. App. 22. He alleged that a neurological disorder called transverse myelitis and other illnesses kept him from working. *Id.* at 2. The agency determined that he was disabled for purposes of his SSI application, but it denied his claim for SSDI benefits because he was not disabled through the date he was last insured for those benefits. *Id.* at 22. Petitioner asked the agency to reconsider its decision as to SSDI benefits, and a few months later the agency again denied that claim. *Ibid.* Petitioner then requested a hearing before an ALJ. *Ibid.*. At the hearing, the ALJ heard testimony from petitioner, his wife, and a vocational expert. *Id.* at 22-23. The ALJ decided that, based on the evidence, petitioner could perform "light work" in jobs that "existed in significant numbers in the national economy" through the

date he was last insured. *Id.* at 37, 52 (emphases omitted). The ALJ accordingly determined that petitioner was ineligible for SSDI benefits. *Id.* at 22-54.

Petitioner requested that the Appeals Council review the ALJ's decision. See Pet. App. 14. On July 27, 2015, the Appeals Council denied his request. *Id.* at 14-19. The Appeals Council's letter to petitioner explained that, "looking at [his] case," the Appeals Council had found no "basis for changing" the ALJ's decision. *Id.* at 15.

The Appeals Council's letter to petitioner explained what his next step should be if he disagreed with SSA's final decision. Under the bold heading "If You Disagree With Our Action," the letter told petitioner that he could "ask for court review * * * by filing a civil action." Pet. App. 16 (emphasis omitted). Under the bold heading "How to File a Civil Action," the agency explained that petitioner "may file a civil action (ask for court review) by filing a complaint in the United States District Court for the judicial district in which you live." *Ibid.* (emphasis omitted). The letter stated that "[t]he complaint should name the Commissioner of Social Security as the defendant," that petitioner should deliver "copies of your complaint and of the summons issued by the court" to the U.S. Attorney for the district where he lives, and that he should also mail copies of the complaint and summons to the SSA Office of the General Counsel that is responsible for the relevant district and to the Attorney General of the United States. *Id.* at 16-17.

The next section of the Appeals Council's letter—with the bold heading "Time to File a Civil Action"—informed petitioner that he had "60 days to file a civil action (ask for court review)." Pet. App. 17 (emphasis omitted). It continued: "The 60 days start the day after

you receive this letter. * * * If you cannot file for court review within 60 days, you may ask the Appeals Council to extend your time to file." *Id.* at 17-18. Finally, the Appeals Council's letter told petitioner that if he had "any questions" he should "call, write, or visit any Social Security office." *Id.* at 18. The last paragraph listed the local office's address and phone number. *Id.* at 19.

Petitioner requested an extension of time to file suit, see Pet. App. 12, and the Appeals Council granted that request, giving him until December 18, 2015 to seek judicial review. *Ibid.* But petitioner did not file suit before December 18. Instead his wife sent SSA two letters on his behalf. The first, on December 10, 2015, began "Dear Appeals Court, I am writing to respectfully disagree and appeal your decision regarding my disability and social security benefits." *Id.* at 4 (quoting D. Ct. Doc. 12-1, Ex. A, at 1 (Oct. 31, 2016)). The letter then proceeded to explain petitioner's objections to the ALJ's decision. D. Ct. Doc. 12-1, Ex. A, at 1-3. The second letter, dated December 14, 2015, again began "Dear Appeals Court," and stated that petitioner was "writing to add to the appeal." Pet. App. 4; D. Ct. Doc. 12-1, Ex. B, at 1. That letter expanded on petitioner's argument that he was entitled to SSDI benefits. D. Ct. Doc. 12-1, Ex. B, at 1-3.

SSA understood petitioner's letters to be asking a second time for review by the Appeals Council. See D. Ct. Doc. 9-5, at 1 (Aug. 23, 2016) (SSA letter stating that the Appeals Council had previously "denied a request for review of the [ALJ's] decision," and confirming that "[t]he [Appeals] Council has now received a second request for review of the same decision"). SSA responded on January 6, 2016, stating that it would "take no action on" petitioner's request because the agency

had already granted his request for an extension of time to file a civil action in federal district court, noting that petitioner had not yet filed suit. *Ibid.*; see Pet. App. 4.

Petitioner contends that, upon reading the Appeals Council's reply, his wife "realized her mistake" in having submitted the letters to SSA rather than filing a complaint in federal district court, and she thereafter requested that SSA grant her more time to file suit. Pet. App. 4. Petitioner contends that she then "went back and forth with [SSA] after it repeatedly told her to wait until her December documents were 'upload[ed] into the system.'" *Id.* at 4-5 (brackets in original).

3. Petitioner eventually filed suit pro se, without a second extension of the filing deadline from SSA, on April 18, 2016. Pet. App. 5. The agency moved to dismiss the complaint as untimely. *Id.* at 10. The district court granted the motion, *id.* at 10-11, stating that it "does not have jurisdiction over a time barred case," *id.* at 11. Petitioner appealed that decision pro se. See *id.* at 5. SSA acknowledged that the filing deadline in 42 U.S.C. 405(g) is subject to equitable tolling, but argued that petitioner was not entitled to equitable tolling under the circumstances of this case. See Gov't C.A. Br. 12-18 (Sept. 12, 2017). The court of appeals thereafter appointed counsel to represent petitioner and ordered supplemental briefing on whether he was entitled to equitable tolling. Pet. App. 5.

After receiving the supplemental briefs, the court of appeals affirmed the district court's dismissal of petitioner's complaint. Pet. App. 1-9. The court of appeals observed (*id.* at 5-6) that both parties had "embrace[d]" the two-element standard for equitable tolling described in *Pace*, see p. 3, *supra*, and so the court declined to con-

sider whether any other standard would apply. Applying the *Pace* standard, the court noted that the government did not dispute petitioner's diligence, but the court held that petitioner had not shown extraordinary circumstances because his "delay was not beyond his control." Pet. App. 6. The court found that petitioner had not disputed "that he had the capacity to appeal" and that his wife "simply made a mistake by sending the appeal to the wrong place." *Ibid.* As a result, the court found that petitioner "was responsible for his own delay" and "[t]here was no external obstacle that prevented a timely filing." *Id.* at 7.

The court of appeals rejected petitioner's contention that his letters to SSA in December 2015 qualified as "extraordinary circumstances" that warranted equitable tolling by analogy to the defective-pleading cases, *Burnett* and *Herb*. Pet. App. 7; see pp. 4-5, *supra*. The court reasoned that neither of those cases addressed the Social Security Act, and both involved circumstances where the plaintiffs had filed their lawsuits in state courts that were "an improper venue." Pet. App. 7. The court held that "[t]he rationale of these cases does not extend to a situation like this one under § 405(g), where federal courts have exclusive jurisdiction over a claim, and the complainant mistakenly corresponded with an agency rather than a court of competent jurisdiction." *Ibid.* (citing *Jackson* v. *Astrue*, 506 F.3d 1349, 1357 (11th Cir. 2007)). Instead, the court held that petitioner's "failure to file his appeal in the district court despite clear, repeated instructions that he should do so 'is at best a garden variety claim of excusable neglect' for which equitable tolling is unavailable." *Id.* at 7-8 (quoting *Irwin*, 498 U.S. at 96).

ARGUMENT

Petitioner contends (Pet. 21-29) that the court of appeals erred by declining to permit his time-barred claim to go forward by application of equitable tolling. He argues (Pet. 21-24) that this Court should resolve an asserted "tension" that exists between the Court's decisions in *Burnett* v. *New York Central Railroad*, 380 U.S. 424 (1965), and *Menominee Indian Tribe* v. *United States*, 136 S. Ct. 750 (2016). He further argues (Pet. 9-12, 23-24) that the court of appeals' decision deepens a disagreement among the circuits about when a defective pleading may support equitable tolling. Those contentions lack merit. The court's decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. a. The court of appeals correctly determined that, in the particular circumstances of this case, petitioner is not entitled to equitable tolling. This Court has instructed that courts must apply equitable tolling "sparingly." *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). For that reason, equitable tolling does not apply on the basis of a "garden variety claim of excusable neglect." *Holland* v. *Florida*, 560 U.S. 631, 651 (2010) (quoting *Irwin*, 498 U.S. at 96). Instead, a plaintiff generally must establish both that he has been pursuing his rights diligently and that an extraordinary circumstance beyond his control prevented him from filing suit on time. See *Menominee*, 136 S. Ct. at 755-756 (referring to these two requirements as "elements" and holding that a plaintiff requesting equitable tolling must establish both).

Petitioner cannot meet the second element of that standard, as the court of appeals correctly concluded,

because his untimely filing was not based on any circumstance beyond his control. Pet. App. 6-7. Instead, it was based simply on his wife's mistake in "overlooking the directions" that SSA sent to petitioner, despite those directions being "clear" and "repeated." *Id.* at 7. The court of appeals' decision is a straightforward application of *Menominee* and *Pace* v. *DiGuglielmo*, 544 U.S. 408 (2005).

b. Petitioner no longer contends that some external obstacle stood in his way and prevented him from making a timely filing. Instead he suggests that, by invoking cases concerning defective pleadings (especially *Burnett*), he can be eligible for equitable tolling *without* showing that the untimely filing was due to a circumstance beyond his control. See Pet. 21-22 (arguing that this Court has "held that a timely but 'defective pleading' can sometimes warrant equitable tolling, * * * and pleading defects are *not* beyond the litigant's control") (citations omitted). But petitioner did not present his argument for equitable tolling that way to the court of appeals. Rather, his counseled brief "embrace[d]" (Pet. App. 6) the general two-element equitable tolling standard from *Pace*, including the requirement "that some extraordinary circumstance *stood in his way*," *id.* at 5 (quoting 544 U.S. at 418) (emphasis added); see Pet. C.A. Supp. Br. 12 (Apr. 24, 2018) (quoting *Pace* as the appropriate standard for equitable tolling). As this Court had explained in *Menominee* by the time petitioner filed his brief with counsel in the court of appeals, "the phrase 'external obstacle' merely reflects [the Court's] requirement that a litigant seeking tolling show 'that some extraordinary circumstance *stood in his way*.'" 136 S. Ct. at 756 (citation omitted). "This phrasing * * * in *Pace* * * * would make little sense if

equitable tolling were available when a litigant was responsible for [his] *own* delay." *Ibid.* Petitioner's request to the court of appeals to apply *Pace* is in tension (at minimum) with his suggestion in the petition that he should not have been required to show that something stood in his way of making a timely filing.

In any event, the court of appeals correctly determined that petitioner is not entitled to equitable tolling under the defective-pleading cases. See Pet. App. 7-8 (discussing *Burnett*, 380 U.S. at 424-425, 429, and *Herb* v. *Pitcairn*, 325 U.S. 77, 78-79 (1945)). Those cases sometimes permit equitable tolling when a plaintiff "has actively pursued his *judicial remedies*" by filing a lawsuit on time, but in the wrong court. *Irwin*, 498 U.S. at 96 (emphasis added). Here, petitioner did not timely file suit in any court, or otherwise clearly indicate that he wanted to pursue *judicial* review. Instead, he sent letters to SSA requesting further review, "despite clear, repeated instructions" that he should "file his appeal in the district court." Pet. App. 7; compare *Burnett*, 380 U.S. at 429-430 ("[Defendant] could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that [Plaintiff] was actively pursuing his [judicial] remedy.").

Application of equitable tolling under the defective-pleading cases "depend[s] heavily on the fact that" the plaintiff's initial (incorrect) filing informed the defendant of "exactly the same cause of action subsequently asserted." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 467 (1975); see *Burnett*, 380 U.S. at 429 ("Service of process was made upon the respondent notifying him that petitioner was asserting his cause of action."); see also Pet. App. 7 (explaining that the plaintiff's mistake in *Burnett* was to file in "an improper

venue"). Parity between the two filings is essential, because only then does "the prior filing" give the defendant adequate notice and so "operate[] to avoid the evil against which the statute of limitations was designed to protect." *Johnson*, 421 U.S. at 467. But petitioner's December 2015 letters gave SSA no clear indication of his intent to seek judicial review, and they bore little resemblance to the pleading that SSA had clearly instructed petitioner to file in court in order to initiate judicial review under 42 U.S.C. 405(g). See Pet. App. 16-17. The letters were not styled as a "complaint," they did not "name the Commissioner of Social Security as the defendant," and they did not generate a "summons issued by the court." *Ibid.*

Unlike the defendants in cases where a plaintiff has misdirected his lawsuit, the agency here reasonably believed that petitioner was seeking further administrative review, not that he meant to initiate litigation in court. See D. Ct. Doc. 9-5, at 1 (SSA letter responding to petitioner's "second request for review of the [ALJ's] decision" that "[t]he [Appeals] Council has now received"); see also Pet. App. 4. The defective pleading doctrine does not apply in those circumstances. See *International Union of Elec., Radio & Mach. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 238 (1976) (initiation of a contractual grievance proceeding did not support equitable tolling under *Burnett* because the grievance proceeding did not "giv[e] notice to respondent of [his] statutory claim"). And it especially should not apply when the defendant that lacked clear notice of the plaintiff's intent to seek judicial review is an agency like SSA, which must track millions of claims (and many thousands of potential lawsuits) every year. See *Bowen* v. *City of New York*, 476 U.S. 467, 481 (1986). The court

of appeals was therefore correct to conclude that "[t]he rationale of" the defective-pleading cases "does not extend to a situation like this one." Pet. App. 7. And that factbound determination does not warrant further review by this Court.

2. Petitioner additionally contends (Pet. 9-14) that the court of appeals' decision reveals a tension within this Court's equitable tolling jurisprudence and deepens a disagreement among the circuits about when a plaintiff's defective pleading may be entitled to equitable tolling. Those arguments do not warrant this Court's review.

a. Petitioner asserts (Pet. 1-2, 13-14), that this Court's decision in *Menominee*—by holding that a plaintiff seeking equitable tolling must demonstrate an extraordinary circumstance that was beyond his control, 136 S. Ct. at 756—called into question the continued validity of the defective-pleading cases like *Burnett*, reasoning (Pet. 14) that a defective pleading is almost always within the plaintiff's control.

Petitioner does not identify any part of the decision below, or any decision of any other court of appeals, expressing confusion about the impact of *Menominee*'s holding on genuine defective-pleading cases, such as *Burnett*, where the plaintiff simply files his lawsuit in the wrong court. But in any event, this case would not be a suitable vehicle for considering that question. Petitioner's counseled brief to the court of appeals did not even cite *Menominee*, let alone ask the court to clarify how that precedent impacts defective-pleading cases like *Burnett*. This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam).

Petitioner instead "embrace[d]" the general, two-element equitable tolling standard—the one this Court described in *Pace* and elaborated in *Menominee*—arguing only that his letter to the agency qualified as an extraordinary circumstance. Pet. App. 5-7. The court of appeals used the standard that petitioner had asked to be applied, and then rejected petitioner's contention that an extraordinary circumstance occurred here, finding that nothing had stood in petitioner's way of making a timely filing. *Id.* at 6-7. Moreover, the court did not disagree with petitioner's argument that a defective pleading can warrant equitable tolling in some circumstances; the court simply found that petitioner was not entitled to take advantage of that tolling principle here, where he sent a letter to the agency seeking further review in disregard of clear instructions to file a complaint in federal district court. *Ibid.* The court of appeals accordingly had no occasion to address any purported tension in this Court's equitable tolling case law, and that issue is not properly preserved for this Court's review.

b. Petitioner contends (Pet. 23) that the decision below deepens a "three-way disagreement" in the courts of appeals about whether the defective-pleading cases permit equitable tolling when a plaintiff files in an incorrect forum lacking jurisdiction. But the court of appeals' decision does not implicate any disagreement among the circuits.

Petitioner argues that the Eleventh Circuit has adopted a per se rule "that filing in a court without competent jurisdiction does not toll the statute of limitation[s]." Pet. 10 (quoting *Booth* v. *Carnival Corp.*, 522 F.3d 1148, 1152 (11th Cir. 2008)) (emphasis omitted). He further asserts that the Fourth and Sixth Cir-

cuits hold that filing in a court that clearly lacks jurisdiction generally will not support equitable tolling, but tolling may be available if the plaintiff had a reasonable jurisdictional theory. *Ibid.* (citing, among others, *Shofer* v. *Hack Co.*, 970 F.2d 1316, 1319 (4th Cir. 1992), and *Fox* v. *Eaton Corp.*, 615 F.2d 716, 719-720 (6th Cir. 1980), cert. denied, 450 U.S. 935 (1981)). And the Ninth Circuit, petitioner says, permits equitable tolling regardless of "the presence or absence of subject matter jurisdiction" in the initial court. *Ibid.* (quoting *Valenzuela* v. *Kraft, Inc.*, 801 F.2d 1170, 1175 (9th Cir. 1986)); see Pet. 11-12 (arguing that the Fifth, Tenth, and Federal Circuits follow "a similar approach").

Petitioner contends (Pet. 24) that, in rejecting his equitable tolling claim, the court of appeals joined the Eleventh Circuit in adopting a per se rule that equitable tolling is categorically unavailable to a plaintiff who files in a forum lacking jurisdiction. That is mistaken. The court below held only that the "rationale of" the defective pleading doctrine "does not extend" to the situation in this case: where a plaintiff, despite "exclusive jurisdiction" in the federal district court and "clear, repeated instructions" to file in that court, "mistakenly correspond[ed] with an agency rather than a court of competent jurisdiction." Pet. App. 7. The court did not say that it was adopting a per se rule like the Eleventh Circuit's.[*]

---

[*] In a prior case, the Eighth Circuit had expressly "decline[d] to decide the question of whether or not equitable tolling should be allowed where the prior dismissal was on jurisdictional grounds." *Weathers* v. *Bean Dredging Corp.*, 26 F.3d 70, 73 (1994). It would therefore have been strange for the court of appeals here to have decided that question without clearly saying so. In addition, while the court of appeals cited *Jackson* v. *Astrue*, 506 F.3d 1349, 1357 (11th Cir. 2007), in support of its determination that the defective-pleading cases were distinguishable from this case, see Pet. App. 7,

Furthermore, none of the decisions cited by petitioner holds that equitable tolling would be available in the circumstances of this case, where a plaintiff had received explicit instructions to file his case in federal district court, but nevertheless sent a request for additional review to an administrative agency in a manner that indicated the plaintiff was requesting further administrative review rather than judicial review. See D. Ct. Doc. 9-5, at 1; Pet. App. 4.

Petitioner cites various decisions addressing whether the defective-pleading cases authorize equitable tolling of a judicial filing deadline when the plaintiff files his lawsuit in a court lacking jurisdiction. See Pet. 10-12 (discussing, among others, *Booth*, *Shofer*, *Fox*, *Valenzuela*, and *Loftis* v. *Chrisman*, 812 F.3d 1268, 1271-1274 (10th Cir. 2016)). He cites other cases considering whether an administrative deadline may be equitably tolled based on a timely filing, that provided adequate notice, but that was sent to the wrong agency or body within an agency. See Pet. 11-12 (citing *Granger* v. *Aaron's, Inc.*, 636 F.3d 708, 710-711, 713 (5th Cir. 2011), and *National Cement Co.* v. *Federal Mine Safety & Health Review Comm'n*, 27 F.3d 526, 531 (11th Cir. 1994)). In *Jaquay* v. *Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (cited at Pet. 12), the plaintiff filed the correct document (a request for administrative reconsideration), but mailed it to the wrong office within the agency, and thereby missed a deadline to seek judicial review. See *id.* at 1279. But none of those cases implicate the core defect in petitioner's argument here based on *Burnett*: Petitioner failed to give the agency clear

---

that may have been because petitioner's counseled brief had favorably cited *Jackson* as an example of the correct standard for equitable tolling. See Pet. C.A. Supp. Br. 12-13.

notice that he wanted to seek judicial review, rather than further administrative review, of his claim. Petitioner also cites (Pet. 10) the Ninth Circuit's decision in *Sloan* v. *West*, 140 F.3d 1255 (1998), for the proposition that equitable tolling can be proper where "a claimant filed suit in a venue without jurisdiction over the claim." *Id.* at 1262. But as petitioner acknowledges, the Ninth Circuit holds that equitable tolling requires "adequate 'notice to [the] defendant.'" Pet. 11 (quoting *Valenzuela*, 801 F.2d at 1175) (brackets in original). Petitioner's letters to SSA failed to provide the notice that was required.

Finally, petitioner cites (Pet. 12) as the example "[m]ost similar to the facts of this case" the Federal Circuit's decision in *Santana-Venegas* v. *Principi*, 314 F.3d 1293 (2002), which equitably tolled the deadline for seeking review in the United States Court of Appeals for Veterans Claims because the veteran mistakenly sent his timely notice of appeal to a regional office within the Department of Veterans Affairs. *Id.* at 1298. But that decision, too, does not conflict with the court of appeals' decision in this case, because unlike petitioner's letters to SSA, the veteran's misfiled notice of appeal in *Santana-Venegas* unambiguously informed the agency that the veteran sought *judicial* review. See *id.* at 1295 (observing that the claimant had sent to the agency his "notice of appeal to the Veterans Court").

Petitioner has not identified any court of appeals that would find he was entitled to equitable tolling on the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
LEWIS S. YELIN
JOSHUA DOS SANTOS
Attorneys

DECEMBER 2019