No. 17-1606

In the Supreme Court of the United States

RICKY LEE SMITH,

Petitioner,

v.

NANCY A. BERRYHILL, Deputy Commissioner for Operations, Social Security Administration,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

WOLODYMYR CYBRIWSKY
Cybriwsky Wolodymyr
Law Office
214 South Central Avenue
Prestonsburg, KY 41653
(606) 886-8389

ANDREW J. PINCUS
Counsel of Record
PAUL W. HUGHES
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

The Social Security Act provides for judicial review of administrative decisions rejecting benefits claims: "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party," may obtain judicial review of that decision in federal court. 42 U.S.C. § 405(g).

Disability benefit claims are initially heard by an administrative law judge; adverse decisions may be appealed to the Appeals Council. Appeals Council decisions rejecting a claim on the merits are subject to judicial review. But the courts of appeals disagree about whether judicial review is available when the Appeals Council finally rejects a claim on the ground that the claimant's administrative appeal was not timely.

The question presented is:

Whether the Appeals Council's decision to reject a disability claim on the ground that the claimant's appeal was untimely is a "final decision" subject to judicial review under Section 405(g).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Cases—continued

Cases—continued

Statutes and Regulations

Other Authorities

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 880 F.3d 813. The orders of the district court (Pet. App. 16a-26a) are unreported.

JURISDICTION

The Sixth Circuit entered its judgment on January 26, 2018. On April 19, Justice Kagan entered an order extending the time for filing a certiorari petition to and including May 25, 2018. The petition was filed on that date, and this Court granted the petition on November 2, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 42 U.S.C. § 405(g) and (h) provide in relevant part:

> (g) Judicial Review.
>
> 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, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia.

> (h) Finality of Commissioner's decision.
>
> The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

2. Department of Health and Human Services regulations codified in Part 416 of Title 20 of the Code of Federal Regulations state:

> 416.1468. (a) Time and place to request Appeals Council review. You may request Appeals Council review by filing a written request. You should submit any evidence you wish to have considered by the Appeals Council with your request for review, and the Appeals Council will consider the evidence in accordance with § 416.1470. You may file your request at one of our offices within 60 days after the date you receive notice of the hearing decision or dismissal (or within the extended time period if we extend the time as provided in paragraph (b) of this section).
>
> (b) Extension of time to request review. You or any party to a hearing decision may ask that the time for filing a request for the review be extended. The request for an exten-

> sion of time must be in writing. It must be filed with the Appeals Council, and it must give the reasons why the request for review was not filed within the stated time period. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 416.1411.
>
> * * *
>
> 416.1471. The Appeals Council will dismiss your request for review if you did not file your request within the stated period of time and the time for filing has not been extended.
>
> 416.1472. The dismissal of a request for Appeals Council review is binding and not subject to further review.

STATEMENT

Each year, thousands of individuals whose claims for disability benefits are denied seek review of those denials by the Social Security Administration's Appeals Council but find their appeals rejected on untimeliness grounds. The question in this case is whether a benefits applicant is entitled to judicial review of such determinations under Section 405(g), which states that "any final decision of the Commissioner of Social Security" is subject to judicial review. 42 U.S.C. § 405(g).

The governing regulations provide that Social Security Administration disability benefits decisions are subject to review by an administrative law judge (ALJ). A claimant may obtain review of the ALJ's decision by the agency's Appeals Council by requesting review within 60 days of receipt of the ALJ's ruling,

although that deadline does not apply if the claimant shows good cause for an untimely request.

Appeals Council decisions denying benefits claims on the merits are reviewable in court under Section 405(g). The question in this case is whether an Appeals Council decision rejecting an appeal on untimeliness grounds constitutes a "final decision" reviewable in court.

Such a ruling qualifies for judicial review under the plain language of Section 405(g): it is the "final" administrative ruling in a case—there is no further administrative consideration of the claim. And rejections of claims on untimeliness grounds are routinely reviewed by courts under statutes with similar finality requirements. The presumption favoring judicial review also weighs heavily in favor of review here. Indeed, the Solicitor General refuses to defend the contrary holding below, recognizing that "a decision of the Appeals Council dismissing as untimely a request for review of an ALJ decision after a hearing is a 'final decision' within the meaning of 42 U.S.C. 405(g)." U.S. Cert. Br. 26.

This Court should hold that such decisions are subject to judicial review and remand the case for consideration of the merits of petitioner Smith's challenge to the Appeals Council's ruling.

A. Legal Background.

"Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015). This Court therefore applies a "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

Title II of the Social Security Act expressly provides for judicial review of all "final decision[s]" of the Commissioner of Social Security. 42 U.S.C. § 405(g). Whether a court has jurisdiction to review a particular decision therefore depends on whether it constitutes a "final decision" by the Commissioner.

The procedure for adjudicating a disputed denial of a Social Security disability benefits claim begins with an initial decision by an administrative law judge (ALJ). If the claimant objects to the ALJ's determination regarding his claim, the claimant may appeal that determination to the Appeals Council. See generally 20 C.F.R. §§ 416.1467 to 416.1482. The deadline for requesting Appeals Council review is 60 days from receipt of notice of the ALJ's decision. *Id.* §§ 404.968, 416.1468. An out-of-time request for review is allowable where the claimant establishes "good cause" for not appealing in a timely manner. *Ibid.*

The regulations provide that "[t]he Appeals Council will dismiss your request for review if you did not file your request within the stated period of time and the time for filing has not been extended." 20 C.F.R. § 416.1471. They further state that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review." *Id.* § 416.1472.

If a request for Appeals Council review is not dismissed, the Council "may deny a party's request for review or it may decide to review a case and make a decision." 20 C.F.R. § 416.1481. "The Appeals Council's decision, or the decision of the administrative law judge if the request for review is denied, is binding unless you or another party file an action in

Federal district court, or the decision is revised." *Ibid.*

The courts of appeals disagree on whether an Appeals Council dismissal of a request for review on the grounds of untimeliness constitutes a "final decision" under Section 405(g). Compare *Brandtner* v. *Department of Health & Human Servs.*, 150 F.3d 1306, 1307 (10th Cir. 1998) ("The dismissal as untimely is not a decision on the merits or a denial of a request for review by the Appeals Council, both of which constitute final decisions and can be reviewed by the federal district court."), with *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1237 (11th Cir. 1983) ("Neither the statute nor the regulations make any distinction in regard to rights of judicial appeal between dismissals and determinations on the merits by the Appeals Council. Both are equally final and both trigger a right to review by the district court.").

B. Factual and Procedural Background.

1. Petitioner Ricky Lee Smith initially applied in September 1987 for supplemental security income based on disability resulting from a tumor on his spine and complications following from the tumor's removal. Pet. App. 3a; J.A. 16.

An ALJ issued a decision in Smith's favor in October 1988, and he received benefits until 2004, when he was found to be ineligible because his financial resources exceeded the permissible limit. Pet. App. 3a.

2. In August 2012, Smith filed a new application for supplemental security income based on the initial finding of disability, as well as additional medical complications resulting from that condition—including chronic back pain, a second recurrence of the spi-

nal tumor, recurrent urinary tract infections from self-catheterization, diverticulitis, hypertension, depression, and anxiety. Pet. App. 3a; J.A. 14, 16-19. The claim was denied, and denied again upon reconsideration. Pet. App. 3a.

Smith timely filed a request for a hearing before an administrative law judge. ALJ Robert Bowling conducted a videoconference on February 18, 2014. Pet. App. 3a. On March 26, 2014, a different ALJ, Don Paris, signed a decision on behalf of ALJ Bowling denying Smith's claim. *Ibid.*; J.A. 8-23.

The ALJ found that Smith had not worked since the 1980s. J.A. 14. He further found that Smith "has the following medically determinable impairments: disorders of the spine, urinary tract infections, diverticulitis, hypertension, depression, and anxiety." *Ibid.*

Next, the ALJ determined that Smith's "medically determinable impairments could reasonably be expected to produce the alleged symptoms"—including back pain, reduced range of motion, nausea, hypertension, digestive problems, and depression. J.A. 19; see also *id.* at 15-19.

He concluded, however, that Smith's "physical and mental impairments, considered singly and in combination, do not significantly limit the claimant's ability to perform basic work activities. Thus, the claimant does not have a severe impairment or combination of impairments." J.A. 23; see also *id.* at 19-23. For that reason, the ALJ concluded that Smith is not disabled and denied his application for benefits. *Id.* at 23.

3. Smith's counsel represented to the Appeals Council and the district court that he mailed to the

Appeals Council on April 24, 2014, a written request for review of ALJ Paris's decision—within the 60-day period for filing an appeal. Pet. App. 3a; 20 C.F.R. §§ 404.968, 416.1468; see also J.A. 24-29 (letter requesting Appeals Council review).

The review request challenged the ALJ decision on the grounds that it was signed by an ALJ who had not heard the evidence and therefore could not properly make the credibility determinations on which the decision rested; that the signing of the opinion by a different ALJ violated the governing rules; that the Social Security Administration and the ALJ had unlawfully overridden the prior determination of disability (and not properly considered the evidence underlying that prior determination); and that the ALJ's decision was not supported by substantial evidence. J.A. 24-29.

Smith's counsel sent a fax to the Social Security Administration dated September 21, 2014, asking about the status of Smith's appeal. Pet. App. 3a. He attached a copy of his written request to appeal, dated April 24, 2014. *Ibid.*; see J.A. 30-37 (copy of fax and enclosures).

A Social Security Administration representative responded in a letter dated October 1, 2014, stating that the April 2014 appeal request "that you stated was mailed to the [Appeals Council] had not been placed in the electronic folder. If the [Appeals Council] had received it, they would have mailed you a receipt." J.A. 38-39. The representative further stated that he had completed a form and submitted it to the Appeals Council, together with the April letter and September fax: "[t]herefore, the status of your [Ap-

peals Council] request is that it is only being filed today, 10/01/14." *Ibid.*

A Social Security Administration representative submitted to the district court a declaration regarding the contents of the official file. J.A. 48-51. It stated that, "[o]n October 1, 2014, [Smith] faxed to the Social Security Administration an undated request for review form, a brief dated April 24, 2014, and a fax cover sheet dated September 21, 2014 requesting the status of the appeal." *Id.* at 50. Smith's counsel represented below that the appeal request had been mailed on April 24, 2014, within the filing deadline, and that the fax had been sent on September 24. Pet. App. 4a & n.1; Dist. Ct. Dkt. No. 9, at 1-2.

On November 6, 2015, the Appeals Council dismissed the request for review as untimely, finding that Smith had not provided evidence indicating that the appeal request was timely filed and, "therefore, * * * no good cause to extend the time for filing." J.A. 41-42.

4. Smith then commenced this action in the United States District Court for the Eastern District of Kentucky, seeking judicial review of the Appeals Council's decision under 42 U.S.C. § 405(g). Smith asserted that the Appeals Council had improperly dismissed his request for review.

The district court dismissed the complaint. Pet. App. 22a-26a. It held that "a decision by the Commissioner to dismiss a claimant's untimely request for an appeal before the Appeals Council is not a final decision subject to judicial review, absent the presence of a colorable constitutional claim." *Id.* at 25a. The court rejected Smith's constitutional claims, holding that due process was not violated by the Ap-

peals Council's dismissal of his claim as untimely or by the signing of the ALJ decision by an ALJ who did not preside over his evidentiary hearing. *Id.* at 25a-26a.[1]

5. The court of appeals affirmed. Pet. App. 1a-15a. It held that the Appeals Council's dismissal of Smith's untimely request for review was not a "final decision" subject to judicial review under Section 405(g). *Id.* at 8a. The court observed that the "majority view is that the Appeals Council's decision to hear an untimely request for review is discretionary, and refusals of such requests do not constitute 'final decisions' reviewable by district courts." *Id.* at 7a. It found "compelling" the Eighth Circuit's conclusion that Appeals Council dismissals for untimeliness "'do[] not address the merits of the claim, and thus cannot be considered appealable, as can the Appeals Council's decisions and denials of *timely* requests for review.'" *Ibid.* (quoting *Smith* v. *Heckler*, 761 F.2d 516, 518 (8th Cir. 1985)).

The court further concluded that Smith had not "established a 'colorable constitutional claim,'" which in the court's view would have provided grounds for overturning the Appeals Council's decision notwithstanding the court's holding that review was not available under Section 405(g). Pet. App. 8a. It rejected Smith's due process argument based on his contention that the request for Appeals Council review was timely filed (*id.* at 9a-13a); his contention that the signing of the decision by an ALJ who did

---

[1] The district court subsequently denied Smith's motion under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment. Pet. App. 16a-21a.

not preside over the hearing violated due process (*id.* at 13a-14a); and his contention that due process was violated by the manner in which the ALJ considered the 1988 disability decision (*id.* at 14a).

SUMMARY OF ARGUMENT

Federal law embodies a general rule that decisions of federal administrative agencies that finally decide the issue before the agency and adversely affect private parties are subject to judicial review. That principle is incorporated in the Administrative Procedure Act and reflected in numerous judicial review provisions contained in individual federal statutes.

Judicial review of agency action serves the important purposes of invalidating arbitrary agency decision-making as well as administrative determinations not rooted in the facts before the agency decision-maker. It also precludes unlawful and unconstitutional agency action. And the possibility of judicial review provides a strong incentive for agencies to conform their decisions to the governing legal standards. Given these important benefits, it is not surprising that "this Court applies a 'strong presumption' favoring judicial of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015).

Against this background, Section 405(g) plainly provides for judicial review of Appeals Council decisions holding that a claimant's request for Appeals Council review was untimely and not excused by good cause.

The statute provides for judicial review of "any final decision of the Commissioner of Social Security made after a hearing." 42 U.S.C. § 405(g). The Appeals Council decision is binding on petitioner and

also plainly is "final"—it is the last step in the administrative decision-making process. That is all that is required to satisfy the statute's finality requirement.

Indeed, this Court has repeatedly held that a decision is "final" within the meaning of the Administrative Procedure Act when it marks the consummation of the agency's decision-making process and determines rights and obligations of private parties. *E.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). The decision here plainly satisfies that standard.

The court below rested its conclusion that the Appeals Council decision is unreviewable principally on the observation that the ruling does not address the merits of petitioner Smith's claim. But that rationale is impossible to square with the statute's authorization of judicial review of "*any* final decision." 42 U.S.C. § 405(g) (emphasis added). And procedural decisions of agencies—and lower courts—are routinely reviewed under statutes requiring a "final" determination.

Neither does this Court's decision in *Califano* v. *Sanders*, 430 U.S. 99 (1977), support, much less compel, the preclusion of judicial review here. That case involved a procedural device—reopening of a prior final decision—that would have given the benefits claimant a second opportunity to obtain judicial review. Petitioner Smith seeks an initial chance for court review of the Appeals Council's decision.

The Court should affirm the reviewability of the Appeals Council's decision and remand the case for further proceedings.

ARGUMENT

Petitioner Is Entitled To Judicial Review Of The Appeals Council's Decision.

Section 405(g) provides in relevant part that "[a]ny individual, *after any final decision of the Commissioner of Social Security made after a hearing* to which he was a party, * * * may obtain a review of such decision by a civil action." 42 U.S.C. § 405(g) (emphasis added).

The Appeals Council's decision here was the final administrative decision with respect to petitioner Smith's benefits claim. And it was preceded by a hearing before an administrative law judge. The Appeals Council's ruling is therefore subject to judicial review under Section 405(g).

A. The Appeals Council's Rejection Of The Claim On Untimeliness Grounds Is A "Final Decision" Within The Meaning Of Section 405(g).

An Appeals Council decision rejecting a case on untimeliness grounds plainly qualifies as a "final decision" within the meaning of Section 405(g). It falls within the plain meaning of that term, and decisions on untimeliness grounds are routinely subject to review under other statutes limiting judicial scrutiny to "final" decisions. The strong presumption favoring judicial review also weighs heavily in favor of that result. Finally, the arguments advanced by the lower courts that have precluded review do not withstand scrutiny.

1. The plain meaning of the term "final decision" encompasses rejection of an appeal on untimeliness grounds.

The starting point for resolving any question of statutory interpretation is the relevant text. *E.g.*, *Limtiaco* v. *Camacho*, 549 U.S. 483, 488 (2007). The key text here—the phrase "final decision"—is not defined in the statute, but its plain meaning clearly encompasses Appeals Council decisions denying an appeal on untimeliness grounds.

"Final" means "[c]oming at the end"; "[m]arking the last stage of a process." *The Compact Oxford English Dictionary* 590 (2d ed. 1991); see also *Merriam-Webster's Collegiate Dictionary* 436 (10th ed. 1996) ("coming at the end: being the last in a series"); *Webster II New College Dictionary* 419 (1995) ("[f]orming or occurring at the end"; "[o]f, relating to, or constituting the last element in a series, process, or procedure").

Moreover, the words "final decision" in Section 405(g) do not appear alone; they are preceded by the modifier "any." Congress's inclusion of that broadening term "undercuts a narrow construction" of the statute. *United States* v. *James*, 478 U.S. 597, 605 (1986); accord *Department of Housing & Urban Dev.* v. *Rucker*, 535 U.S. 125, 131 (2002) ("'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'") (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)).

The Appeals Council decision here is "binding and not subject to further review." 20 C.F.R. § 416.1472. Indeed, the governing regulations make clear that an Appeals Council ruling is the last step in the administrative review process applicable to

disability claims. See generally 20 C.F.R. § 416.1404 to 416.1482.

The Appeals Council's decision therefore satisfies the statute's "final decision" requirement.

That conclusion is confirmed by this Court's interpretation of the term "final" in a closely related statute, the Administrative Procedure Act. That law states in pertinent part that "*final agency action* for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704 (emphasis added).

The Court has long held that an agency action is "final" under Section 704 when it marks the "'consummation' of the agency's decision making process," and under which "rights or obligations have been determined," or from which "legal consequences will flow." *Bennett*, 520 U.S. at 178; accord *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (applying *Bennett* test); *Sackett* v. *EPA*, 566 U.S. 120, 126 (2012) (same).

The Appeals Council's dismissal of Smith's claim clearly satisfies that test.

To begin with, the ruling is not a "tentative recommendation," *Bennett*, 520 U.S. at 178, but rather—as explained above—the last available step in the administrative review process. There is no further administrative consideration of a disability claim dismissed on untimeliness grounds.

And the Appeals Council's ruling indisputably has legal consequences, because it finalizes the ALJ's denial of a benefit claim. See 20 C.F.R. § 416.1455 (ALJ's decision is "binding" if not reviewed by the Appeals Council); J.A. 42 (Appeals Council decision in this case stating that "[t]he Administrative Law

Judge's decision stands as the final decision of the Commissioner").

The court below and other lower courts holding that Appeals Council untimeliness decisions are not subject to judicial review have asserted that because those rulings "do[] not address the merits of the claim," they "cannot be considered appealable." Pet. App. 7a (quoting *Smith*, 761 F.2d at 518).

But that distinction is entirely irrelevant: nothing in the word "final" distinguishes between dispositions based on the merits and dispositions on other grounds. *Casey* v. *Berryhill*, 853 F.3d 322, 326 n.1 (7th Cir. 2017) (Section 405(g) "'allows judicial review when a claim has been presented and finally decided,' even when that final decision is (or purports to be) a dismissal for untimeliness") (citation omitted). That is particularly true when, as here, the term "final decision" is preceded by the word "any."

Indeed, the statutes authorizing appellate review of "final" court decisions do not distinguish between rulings based on the merits or procedural defaults. *E.g.*, 28 U.S.C. §§ 1257, 1291; *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993) (involving question whether failure to comply with deadline resulted from excusable neglect). And neither does the Administrative Procedure Act.[2] There accordingly is no basis for such a distinction here.

2. The presumption favoring judicial review supports reviewability of the Appeals Council's decision.

This Court has long recognized that "Congress rarely intends to prevent courts from enforcing its

---

[2] See U.S. Cert. Br. 21 & n.6.

directives to federal agencies. For that reason, this Court applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining*, 135 S. Ct. at 1651. While the "presumption is rebuttable," the agency bears a "heavy burden" in attempting to show that Congress "prohibit[ed] all judicial review." *Ibid.*

Indeed, judicial review is available even where a statute "plausibly can be read as imposing an absolute bar to judicial review." *Lindahl* v. *Office of Pers. Mgmt.*, 470 U.S. 768, 779 (1985). "[I]f a provision can reasonably be read to permit judicial review, it should be." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2150 (2016) (Alito, J., concurring in part and dissenting in part) (summarizing the case law). Judicial review "enforces the limits that *Congress* has imposed on the agency's power. It thus serves to buttress, not 'undercut,' Congress's objectives." *Id.* at 2151.

Given this presumption, even if the term "final decision" were not clear—which it is—Section 405(g) should be interpreted to encompass Appeals Council decisions on untimeliness grounds. The provision certainly can be "plausibly" interpreted to include Appeals Council untimeliness rulings, and that is all that is required to hold that judicial review is available.

3. This Court's decision in Sanders *is wholly inapposite*

The court below rested its holding in part on the Court's decision in *Califano* v. *Sanders*. Pet. App. 5a-7a. But *Sanders* is wholly inapposite.

The claimant there had filed a claim for disability benefits and proceeded through all of the steps of

administrative review. *Sanders*, 430 U.S. at 102. The claimant then did not seek judicial review of the Secretary's final decision. *Ibid.* Almost *seven years* later, the claimant filed a second claim alleging the same bases for eligibility, and an ALJ denied reopening of the case and dismissed the claim. *Id.* at 102-103.

This Court determined that the federal courts lacked jurisdiction to consider a request "to reopen a claim of benefits" after the claim had been previously rejected. *Sanders*, 430 U.S. at 107-108. It held that the Social Security Act "clearly limits judicial review to a particular type of agency action, a 'final decision of the Secretary made after a hearing.' But a petition to reopen a prior final decision may be denied without a hearing." *Id.* at 108.

The denial of review here does not involve a second bite at the apple seven years after being afforded—and not utilizing—the opportunity to obtain judicial review. It involves Smith's first opportunity for judicial review, and for that reason *Sanders*' rationale does not apply. See *Boley* v. *Colvin*, 761 F.3d 803, 807 (7th Cir. 2014) (explaining that *Sanders* held that "one opportunity for judicial review is enough" and refusing to extend *Sanders* to preclude judicial review of administrative untimeliness decisions).

As the Eleventh Circuit has explained, "review and reopening play fundamentally different roles in the process of administrative decision making and have significantly different effects upon the finality of administrative decisions." *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1237 (11th Cir. 1983). Reopening offers the claimant a "bonus opportunity" for obtaining administrative reconsideration of a final decision,

but the Appeals Council determination to dismiss a case as untimely is the first "final decision" on the claim, and therefore the first opportunity to obtain judicial review—*Sanders*' concern about multiple opportunities for judicial review therefore does not apply. *Id.* at 1238.

The court of appeals also cited *Sanders*' reference to the frustration of the statute's 60-day limitation on judicial review of the Commissioner's decision. Pet. App. 6a. Permitting review of Appeals Council dismissals for untimeliness, however, retains the 60-day period for seeking judicial review; it simply acknowledges that the "final decision" occurred when the Appeals Council dismissed the claim.

Indeed, this Court explained that "Congress' determination * * * to limit judicial review to the original decision denying benefits is a policy choice obviously designed to forestall *repetitive* or belated litigation of stale eligibility claims." *Sanders*, 430 U.S. at 108 (emphasis added). Judicial review of Smith's claim does not enable repetitive litigation: this is his first opportunity to obtain judicial review of the agency's decision.

4. The agency's regulation cannot override the statutory text.

A Social Security Administration regulation provides that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review." 20 C.F.R. § 416.1472. However, as the Solicitor General recognizes (U.S. Cert. Br. 21-23), that regulation cannot override Congress's determination—embodied in the statutory text—that judicial review is available for "any final decision."

Here, there simply is no ambiguity permitting deference to an agency interpretation. *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018) ("deference is not due" under *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), unless a court "is left with an unresolved ambiguity" after applying the relevant canons of statutory construction). And even if the text were less clear, the canon of statutory construction establishing a presumption in favor of judicial review provides another basis for upholding the construction supported by the plain text.

5. Practical considerations favor judicial review.

Judicial review of administrative agency decisions provides critically important protections against arbitrary, irrational, and unlawful administrative actions. Congress provides for judicial review "as an additional assurance that its policies" will be executed properly. *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942).

That purpose is especially important in the context of disability benefits decisions, given the importance of these benefits to the lives of the statute's beneficiaries and the large number of Americans affected.

The Social Security Administration received more than two million claims for supplemental security income in fiscal year 2016 and a similar number of claims for disability payments. Soc. Sec. Admin., *Annual Statistical Supplement, 2017: Tables 2.F5, 2.F6* (Mar. 2018), perma.cc/4Y8G-NRML.

The Appeals Council disposed of 159,000 requests for review during that same period. Soc. Sec.

Admin., *Annual Statistical Supplement, 2017: Table 2.F11* (Mar. 2018), perma.cc/76YK-JWDM. Approximately one hundred judges and officers decide these cases. See Soc. Sec. Admin., *Brief History and Current Information About the Appeals Council* (last visited Dec. 12, 2018), perma.cc/Z9NE-BBXS. And the government represents that approximately 2,500 cases were dismissed on untimeliness grounds in fiscal year 2017. U.S. Br. 29.

Prior studies have documented the heavy administrative workload borne by Appeals Council personnel. Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. U. L. Rev. 199, 257 (1990) (reporting that Appeals Council members could spend only ten to fifteen minutes reviewing an average case); David Fahrenthold, *The Biggest Backlog in the Federal Government*, Wash. Post (Oct. 18, 2014), perma.cc/NQ7S-F48F.

Given these realities, judicial review is especially critical to protect Americans against arbitrary and unjustified agency action. That is true both with respect to the determination regarding the timeliness of the filing of an appeal and the decision whether good cause exists to excuse an untimely filing. See 20 C.F.R. § 416.1468(b) (explaining that the deadline may be extended upon a showing of good cause). Indeed, as the Seventh Circuit recently observed in a closely related context, "[a] court ought not assume that good cause is missing, and that judicial review would frustrate the regulation, when the existence of good cause is the very issue the claimant seeks to present. A district court's decision that good cause

for an extension exists (or doesn't) is subject to appellate review." *Boley*, 761 F.3d at 807.

Significantly, courts in the Eleventh Circuit—the one court of appeals that historically has permitted judicial review of Appeals Council determinations in these circumstances—do find that the Appeals Council was unjustified in dismissing a claim. See, *e.g.*, *Davis* v. *Colvin*, 2013 WL 1174157, at *6, 8 (M.D. Fla. 2013) (holding that the Appeals Council's dismissal on grounds of untimeliness was unfounded); *Counts* v. *Commissioner of Soc. Sec.*, 2010 WL 5174498, at *10 (M.D. Fla. 2010) (holding that a dismissal was "not based on substantial evidence"); *Walker* v. *Commissioner of Soc. Sec.*, 2013 WL 3833199, at *7-8 (M.D. Fla. 2013) (reversing the decision of the Appeals Council when it incorrectly failed to consider new evidence); *Pizarro* v. *Commissioner of Soc. Sec.*, 2013 WL 847331, at *4 (M.D. Fla. 2013) (upholding a magistrate judge's conclusion that a dismissal was not based on substantial evidence).

Here, petitioner has a strong argument that his appeal was timely or, alternatively, that he should have been granted an extension.

Smith's lawyer represented to the Appeals Council and to the district court that he had filed a timely appeal. Concerned about the absence of any communications from the Appeals Council, Smith's counsel provided a copy of his April 24, 2014 appeal, along with a statement affirming that the appeal had been mailed to the Appeals Council on that date. J.A. 30-37; Pet. App. 4a & n.1.

These facts present precisely the sort of agency error that courts within the Eleventh Circuit review

and correct in order to protect deserving claimants. See, *e.g.*, *Counts*, 2010 WL 5174498, at *10 (holding that the Appeals Council's decision to dismiss on the ground of untimeliness was not based on substantial evidence because the agency failed to provide any evidence indicating that the written notice of the reconsideration determination was actually mailed to the claimant).

Certainly the statute entitles petitioner to judicial review of the Appeals Council's determination of untimeliness and lack of good cause.

B. Petitioner Has Satisfied The Other Prerequisites For Judicial Review.

Section 405(g) provides that an individual may obtain judicial review of "any final decision of the Commissioner of Social Security *made after a hearing to which he was a party*." 42 U.S.C. § 405(g) (emphasis added). There is no question that the hearing requirement was satisfied here: an ALJ conducted a hearing on petitioner Smith's benefits claim. See page 7, *supra*.

Notwithstanding the Solicitor General's references to the "hearing" requirement (*e.g.*, U.S. Cert. Br. 16, 17), moreover, a hearing and decision by an ALJ is not always required to enable an individual to obtain judicial review. In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the Court stated that the prerequisites set forth in Section 405(g) "consist[] of two elements, only one of which is purely 'jurisdictional' in the sense that it cannot be 'waived' by the Secretary in a particular case." *Id.* at 329.

The waivable element "is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the

requirement that a claim for benefits shall have been presented to the Secretary." *Mathews*, 424 U.S. at 329. While "[o]rdinarily, the Secretary has discretion to decide when to waive the exhaustion requirement," as this Court "held in *Eldridge*, 'cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." *Bowen* v. *City of New York*, 476 U.S. 467, 483 (1986).

Moreover, the statutory reference to a hearing does not necessarily require a live evidentiary proceeding before an ALJ. As the Seventh Circuit held in determining that an ALJ's decision to dispense with a hearing did not preclude judicial review, "'hearing' means whatever process the Social Security Administration deems adequate to produce a final decision." *Boley*, 761 F.3d at 805.

Finally, the Solicitor General states that if a court determines that the Appeals Council erred—either in concluding that an appeal was not timely filed or in finding no good cause to excuse an untimely filing—the court may not address the merits of the benefit denial but is obligated to remand the case to the agency. See U.S. Cert. Br. 24-25. That question is not presented here, and there is no occasion for the Court to address it, but the government's position is not consistent with the Court's decisions in this area, for two reasons.

First, the Court held in *Sims* v. *Apfel*, 530 U.S. 103 (2000), that a claimant may obtain judicial review regarding an issue even if he did not raise the issue in his Appeals Council appeal. "Claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals

Council in order to preserve judicial review of those issues." *Id*. at 112.

Sims thus holds that a court may address an issue in the absence of an Appeals Council determination regarding—or even Appeals Council consideration of—the issue. A court rejecting an Appeals Council untimeliness determination therefore could address the merits of an issue that the claimant did not raise before the Appeals Council.

It would be bizarre to hold that Section 405(g) requires a remand to the Appeals Council simply because the claimant chose to raise the issue before that body. A court could, of course, conclude that its consideration would be aided by the Council's determination, and remand on that basis, but it is not required to do so.[3]

Second, in some circumstances—as discussed above—the exhaustion requirement can be waived, or must be deemed waived. When those circumstances are present, they would provide an additional reason why a remand to the Appeals Council would not be required.

---

[3] The Solicitor General cites (U.S. Cert. Br. 24) *SEC* v. *Chenery Corp*., 318 U.S. 80 (1943). But that decision rested on the importance of safeguarding an agency's prerogatives: "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. * * * [A]n appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Id*. at 88. By holding that a court may address issues not addressed by the Appeals Council, *Sims* determined that these policy determinations are not entrusted to the Appeals Council "alone," and *Chenery*'s rationale therefore does not apply.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic[*]
127 Wall Street
New Haven, CT 06511
(203) 432-4992

WOLODYMYR CYBRIWSKY
Cybriwsky Wolodymyr
Law Office
214 South Central Avenue
Prestonsburg, KY 41653
(606) 886-8389

ANDREW J. PINCUS
Counsel of Record
PAUL W. HUGHES
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus
@mayerbrown.com

Counsel for Petitioner

[*] The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.