

No.

IN THE
Supreme Court of the United States

JOSHUA E. BUFKIN,
Petitioner,

v.

DENIS MCDONOUGH, Secretary of Veterans Affairs,
Respondent.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

Application to the Honorable John G. Roberts, Jr.,
as Circuit Justice for the Federal Circuit

Pursuant to Supreme Court Rule 13.5, Applicant Joshua E. Bufkin hereby requests a 60-day extension of time, to and including January 2, 2024, within which to file a petition for a writ of certiorari.

1. The decision below is *Bufkin v. McDonough*, No. 22-1089 (Fed. Cir. 2023). The Federal Circuit issued its opinion on August 3, 2023, *see* App. A. Unless extended, Applicant's time to seek certiorari in this Court expires November 1, 2023. Applicant is filing this application at least ten days before that date. *See* S. Ct. R. 13.5. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1). Respondent does not object to this extension request.

2. This case concerns the interpretation of an important statute governing review in the United States Court of Appeals for Veterans Claims (the “Veterans Court”) of veterans’ benefits appeals, 38 U.S.C. § 7261(b)(1). That provision requires the Veterans Court to “take due account” of the Secretary of Veterans Affairs’ application of the benefit-of-the-doubt rule, which dictates that “[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination” of a veterans’ benefits claim, “the Secretary shall give the benefit of the doubt to the claimant.” 38 U.S.C. § 5107(b).¹

Mr. Bufkin filed a claim for service connection for several conditions, including post-traumatic stress disorder. App. A at 3. Mr. Bufkin was examined by multiple doctors, who reached differing conclusions as to whether he suffered from PTSD. *Id.* The VA regional offices denied service connection. *Id.* at 2. Mr. Bufkin appealed to the Board of Veterans Appeals (the “Board”), arguing that he was entitled to service connection under the benefit-of-the-doubt rule. The Board denied service connection. *Id.* at 3. Mr. Bufkin then appealed to the Veterans Court, which concluded that the Board’s denial was “not clearly erroneous” and that the “benefit of the doubt doctrine [did] not apply.” *Id.*

Mr. Bufkin appealed to the Federal Circuit, arguing that the Veterans Court misapplied § 7261(b)(1). Mr. Bufkin argued that § 7261(b)(1) requires the Veterans

¹ The Federal Circuit decided a closely related case involving the same statutory interpretation issues on August 9, 2023. *Thornton v. McDonough*, No. 21-2329 (Fed. Cir. 2023). Undersigned counsel for Mr. Bufkin has also been recently retained to represent the claimant in seeking Supreme Court review of that decision. Counsel is concurrently moving for a similar extension of time in *Thornton*. If the motions are granted, counsel intends to file a joint cert petition seeking review of both decisions.

Court to take due account of the *Secretary's* application of the benefit-of-the-doubt rule without consideration of the Board's application, and that § 7261(b) requires a de novo review of how the benefit-of-the-doubt rule was applied. *Id.* at 4. The Federal Circuit affirmed. It interpreted § 7261(b)(1) to be satisfied as long as the Veterans Court addressed the Board's treatment of the benefit-of-the-doubt rule. *Id.* at 5. And the Federal Circuit determined that the Veterans Court had applied the correct standard of review to the Board's ruling. *Id.* at 8.

The issues presented are of exceptional importance to veterans and the veterans court system, because proper application of the benefit-of-the-doubt rule affects a huge volume of veterans claims. And only this Court can review the Federal Circuit's interpretation of the statute in question, because of the Federal Circuit's exclusive subject matter jurisdiction in this area.

3. A 60-day extension within which to file a certiorari petition is reasonable and necessary.

a. Undersigned counsel and her firm have only recently been retained to represent the Applicant in this matter. Additional time is necessary for counsel to become fully familiar with the issues, the decision below, the record, and relevant case law, and to best present the issues for this Court's review.

b. As noted above, Applicant intends to file a joint petition for a writ of certiorari in connection with *Thornton v. McDonough*, No. 21-2329 (Fed. Cir. 2023). Additional time is thus also needed to coordinate the presentation of the two cases.

c. The request is further justified by undersigned counsel's press of business on other pending matters. Among other things, counsel has a petition for certiorari due in this Court on December 4, regarding *Forsythe v. McDonough*, No. 22-1610 (Fed. Cir.) (extension request forthcoming); a reply brief in *In re Canon Inc.*, No. 24-102 (Fed. Cir.), due on October 16; a response brief in *Gesture Technology Partners, LLC v. Apple Inc.*, No. 23-1463 (Fed. Cir.), due on October 27; a reply brief in *Apple Inc. v. Gesture Technology Partners, LLC*, No. 23-1494 (Fed. Cir.), due on November 2; a response and reply brief in *Apple Inc v. Gesture Technology Partners, LLC*, No. 23-1475 (Fed. Cir.), due on December 5; a response and reply brief in *Apple Inc. v. Gesture Technology Partners, LLC*, Nos. 23-1501, 23-1554 (Fed. Cir.), due on December 18; and an answering brief in *Fintiv, Inc. v. Apple Inc.*, No. 23-2208 (Fed. Cir.), due on December 19.

The requested 60-day extension would cause no prejudice to Respondent, who has advised that he has no objection to the extension.

Respectfully submitted,

/s/ Melanie L. Bostwick

Melanie L. Bostwick

Counsel of Record

ORRICK, HERRINGTON & SUTCLIFFE LLP

1152 15th Street, NW

Washington, DC 20005

(202) 339-8400

mbostwick@orrick.com

October 12, 2023