

In the Supreme Court of the United States

RICKY LEE SMITH,
Applicant,

v.

NANCY A. BERRYHILL, Deputy Commissioner for Operations,
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 SIXTH CIRCUIT**

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Ricky Lee Smith respectfully requests a 29-day extension of time, to and including Friday, May 25, 2018, within which to file a petition for a writ of certiorari in this case.

The United States Court of Appeals for the Sixth Circuit entered its judgment on January 26, 2018. Unless extended, the time for filing a petition for a writ of certiorari will expire on April 26, 2018. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254. The opinion of the Sixth Circuit is attached and published at 880 F.3d 813.

1. Petitioner Ricky Lee Smith filed an application for supplemental security income resulting from disability and received an unfavorable decision from an administrative law judge. Slip op. 1. The notice of that decision stated that petitioner had 60 days to file a written appeal with the Appeals Council if he wished to contest

the decision. *Ibid.* Petitioner affirms that he timely mailed a request for review to the Appeals Council, but—after the 60-day deadline had elapsed—the Social Security Administration informed petitioner that it had never received his request. *Id.* at 2-3. The Appeals Council dismissed petitioner’s request for review as untimely. *Id.* at 3.

The question that will be presented in the petition is whether an Appeals Council’s final decision not to consider a request for review that it deems untimely is a “final decision” subject to judicial review.

2. There is a square and acknowledged conflict among the courts of appeals with respect to the issue that will be presented in the petition.

Both the district court and the Sixth Circuit held that the Appeals Council’s dismissal of petitioner’s request was not a final decision that would allow for judicial review. Slip op. 3.

In so holding, the Sixth Circuit joined a majority of circuits that have held that such determinations do not constitute “final decisions” reviewable by district courts. See slip op. 5 (citing *Brandtner v. Department of Health & Human Servs.*, 150 F.3d 1306, 1307 (10th Cir. 1998); *Bacon v. Sullivan*, 969 F.2d 1517, 1520 (3d Cir. 1992); *Matlock v. Sullivan*, 908 F.2d 492, 494 (9th Cir. 1990); *Harper ex rel. Harper v. Bowen*, 813 F.2d 737, 743 (5th Cir. 1987); *Adams v. Heckler*, 799 F.2d 131, 133 (4th Cir. 1986); *Dietsch v. Schweiker*, 700 F.2d 865, 867 (2d Cir. 1983)).

The court below recognized, however, that “the Eleventh Circuit sees this issue differently.” Slip op. 5. Indeed, in *Bloodsworth v. Heckler*, 703 F.2d 1233 (11th Cir. 1983), the Eleventh Circuit observed that the majority view “would leave a claimant permanently in limbo,” as “the decision of the administrative law judge would not be

final until the Appeals Council had reviewed it on the merits.” *Id.* at 1239. And “Appeals Council dismissals are reviewable only by appeal to the federal district court, which adoption of the [majority view] would foreclose,” rendering the claimant “finished.” *Ibid.* Because “‘final decision’ is *not* synonymous with complete exhaustion of administrative remedies,” the court held that an Appeals Council review determination is “the appropriately ‘final decision’ from which to take an appeal to the district court.” *Id.* at 1237 (citing *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975)).

3. This legal issue is extremely important. Congress designed supplemental security income benefits as an “assistance source of last resort for the aged, blind, or disabled whose income and resources are below specified levels.” *SSI Annual Statistical Report, 2016*, U.S. Soc. Sec. Admin., 1 (Nov. 2017), perma.cc/H483-LHLK.

Every year, the Appeals Council dismisses thousands of disability claims, often on grounds of untimeliness. A. George Lowe, *The Appeals Council Process*, U.S. Soc. Sec. Admin., 7-8, perma.cc/Z4K7-DWN9 (administrative appeals judge noting the 2,365 dismissals by the Appeals Council in 2008 and describing the rationale for dismissal as “untimely, etc.”). Outside the Eleventh Circuit, individuals whose claims are dismissed are categorically barred from obtaining judicial review of the Appeals Council’s determination—within the Eleventh Circuit, by contrast, district courts review and, in a number of cases, reverse the Appeals Council’s determination of untimeliness and proceed to address the merits of the individual’s entitlement to disability benefits. *E.g.*, *Pittman v. Astrue*, 2012 WL 6765230, at *2-3 (M.D. Ga. 2012), report and recommendation adopted, 2013 WL 55690 (M.D. Ga. 2013).

This Court's guidance is essential to ensure that individuals seeking this last-resort assistance source are not "permanently in limbo," deprived of any judicial review of the Appeals Council's refusal to adjudicate their appeals.

4. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Undersigned counsel has several other matters with proximate due dates, including: an oral argument on April 17, 2018, in *Lamar, Archer & Cofrin v. Appling*, No. 16-1215 (S. Ct.); a reply in support of a petition for a writ of certiorari due on April 30, 2018, in *Borrell v. Richer*, No. 17-1305 (S. Ct.); a brief in opposition due on May 2, 2018, in *Maddox v. Miller*, 17-1123 (S. Ct.); and a brief in opposition due on May 9, 2018, in *Michigan Gaming Control Board v. Moody*, No. 17-1142 (S. Ct.).

For the foregoing reasons, the application for a 29-day extension of time, to and including Friday, May 25, 2018, within which to file a petition for a writ of certiorari should be granted.

April 13, 2018

Respectfully submitted.



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