No. 09-

IN THE
Supreme Court of the United States

DAVID L. HENDERSON,

Petitioner,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 7266(a) of Title 38, U.S.C., establishes a 120-day time limit for a veteran to seek judicial review of a final agency decision denying the veteran's claim for disability benefits. Before the decision below, the Federal Circuit in two en banc decisions held that Section 7266(a) constitutes a statute of limitations subject to the doctrine of equitable tolling under this Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). In the divided en banc decision below, however, the Federal Circuit held that this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), superseded *Irwin* and rendered Section 7266(a) jurisdictional and not subject to equitable tolling.

The question presented is whether the time limit in Section 7266(a) constitutes a statute of limitations subject to the doctrine of equitable tolling, or whether the time limit is jurisdictional and therefore bars application of that doctrine.

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The en banc opinion of the court of appeals is reported at 589 F.3d 1201. Pet. App. 1a-73a. The opinion of the Court of Appeals for Veterans Claims ("Veterans Court") dismissing the case for lack of jurisdiction is reported at 22 Vet. App. 217. Pet. App. 74a-92a. The final agency decision issued by the Board of Veterans' Appeals ("Board") denying the claim for disability benefits is unreported. *Id.* at 103a-17a.

JURISDICTION

The court of appeals entered judgment on December 17, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 7266(a) of Title 38, U.S.C., establishes the time limit for a veteran to commence an action in the Veterans Court challenging a denial of disability benefits by the Board:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

STATEMENT

While our military fights simultaneous wars in Iraq and Afghanistan, the United States successfully urged the Federal Circuit to hold that Congress forbade this Nation's veterans in *all* cases from obtaining equitable tolling of the time limit to seek judicial review of a final agency decision denying disability benefits. As the dissenting judges aptly observed, the decision below "creates a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." Pet. App. 46a. The dissent was right to call this outcome "indefensible" and a "heavy blow" that "will prove calamitous for many severely disabled veterans." *Id.* at 68a, 70a, 71a.

In casting aside two en banc decisions that for over a decade governed the ability of thousands of veterans to obtain judicial review of disability benefit denials, the majority reasoned that this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), superseded *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), with respect to time limits for seeking judicial review of agency action. Pet. App. 33a-34a. Because the Federal Circuit has exclusive jurisdiction to decide the issue, no circuit conflict on the question presented is possible and the decision below will have immediate nationwide effect on one of the country's largest and most important public benefit programs. This Court's review is clearly warranted to determine whether *Irwin* or *Bowles* governs the time limit for filing suit to challenge an agency decision denying veterans benefits.

I. Statutory Framework

a. *Administrative Process*. A veteran seeking benefits for a service-connected disability begins the administrative process by filing an application at one of over fifty regional offices of the Department of Veterans Affairs ("VA"). 38 U.S.C. § 5101(a). Throughout the administrative process, the Secretary of Veterans Affairs ("Secretary") has a statutory "duty to assist" the veteran in developing his or her claim. *Id.* § 5103A(a). The VA regional office must notify the veteran "on a timely basis" whether the Secretary will provide disability benefits. *Id.* § 5104(a); *see Shinseki v. Sanders*, 129 S. Ct. 1696, 1700-01 (2009).

The initial decision of the VA regional office is "subject to one review on appeal to the Secretary." 38 U.S.C. § 7104(a). "Final decisions of such appeals shall be made" by the Board, *id.* § 7101(a), an administrative body within the VA that is accountable to the Secretary. *Id.* § 7101(c). Proceedings before the Board are "ex parte in nature and nonadversarial." 38 C.F.R. § 20.700(c); *accord Sanders*, 129 S. Ct. at 1707 ("[T]he adjudicatory process is not truly adversarial, and the veteran is often unrepresented during the claims proceedings."). The Secretary thus does not appear before the Board. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 310-11 (1985) ("no Government official appears in opposition" at the VA regional office and Board).

b. *Judicial Review*. In 1988, Congress enacted the Veterans' Judicial Review Act, which for the first time provided for judicial review of final agency decisions denying disability benefits to veterans. Pub. L. No. 100-

687, 102 Stat. 4105 (Nov. 18, 1988) (codified as amended in scattered sections of 38 U.S.C.). The Act's primary purpose was to ensure that veterans, in return for their service to the country, receive all the disability benefits to which they are entitled. S. Rep. No. 100-418, at 29, 31 (1988); H.R. Rep. No. 100-963, at 13, 26 (1988).

The Act permits a veteran to challenge a final agency decision denying benefits by bringing suit in the Veterans Court, an Article I legislative court. 38 U.S.C. § 7251. The Veterans Court

> shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have the power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

Id. § 7252(a).

Section 7266(a) establishes a 120-day time limit for a veteran to commence suit against the Secretary in the Veterans Court:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

Id. § 7266(a).

c. *Appellate Review*. A veteran may appeal a Veterans Court decision to the Federal Circuit "by filing a notice of appeal with the [Veterans Court] within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts." *Id.* § 7292(a). The Federal Circuit has exclusive jurisdiction to review Veterans Court decisions. *Id.* § 7292(c).

II. Proceedings Below

a. Petitioner David L. Henderson joined the military in 1950, the year the United States entered the Korean conflict. Pet. App. 3a. He was discharged while on active duty in 1952 after being diagnosed with paranoid schizophrenia "for which he has established service connection and currently has a 100% disability rating." *Id.*

In August 2001, Henderson, unrepresented by counsel, applied to a VA regional office for special monthly compensation for in-home care related to his service-connected mental health disability. After the VA regional office denied Henderson's claim, he sought review *pro se* in the Board. On August 30, 2004, the Board issued the final decision of the Secretary denying Henderson's claim for benefits. *Id.*

b. On January 12, 2005, 135 days after the Board mailed its decision, Henderson commenced a *pro se* action against the Secretary in the Veterans Court. *Id.* The Veterans Court ordered Henderson to show cause why his case should not be dismissed for failure to comply with the 120-day time limit under Section 7266(a).

Id. at 4a. Henderson asked the Veterans Court to excuse his late filing because it resulted from the very disability for which he sought benefits—his paranoid schizophrenia which rendered him incapable of rational thought. *Id.*

At that time, the Federal Circuit had held in two en banc decisions that Section 7266(a) constituted a 120-day "statute of limitations" subject to equitable tolling. *Jaquay v. Principi*, 304 F.3d 1276, 1284 (Fed. Cir. 2002) (en banc); *accord Bailey v. West*, 160 F.3d 1360, 1368 (Fed. Cir. 1998) (en banc). In those cases, the court of appeals determined that the government failed to overcome the presumption of *Irwin*, 498 U.S. at 95-96, that statutes of limitations for suits against the government are subject to equitable tolling. *Jaquay*, 304 F.3d at 1286-89; *Bailey*, 160 F.3d at 1365-68. The Federal Circuit also had held that a veteran's mental illness may provide a basis for equitable tolling of the 120-day time limit. *Barrett v. Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004).

On March 14, 2006, the Veterans Court in a single-judge order dismissed Henderson's *pro se* case. The court found that Henderson's "mental illness and medical impairments rendered him incapable of rational thought or deliberate decision making and unable to handle his own affairs or function in society." Pet. App. 101a. The court nonetheless refused to equitably toll the 120-day time limit on the ground that Henderson did not show that his medical condition directly caused the delay. *Id.* On October 31, 2006, the Veterans Court granted Henderson's motion for reconsideration, revoked the single-judge order, assigned the matter to

a panel for decision, and pro bono counsel entered an appearance to represent Henderson. *Id.* at 97a.

More than six months later, while the case was pending before the Veterans Court panel, this Court in *Bowles*, 551 U.S. at 208-09, held that the time limits in Federal Rule of Appellate Procedure 4 and 28 U.S.C. § 2107(a) are "jurisdictional." On August 3, 2007, the Veterans Court directed Henderson and the Secretary to submit supplemental memoranda addressing *Bowles*'s "effect, if any . . . on the line of cases currently allowing for equitable tolling of the time limitations prescribed for filing an appeal under 38 U.S.C. § 7266(a)." Pet. App. 94a.

In July 2008, a divided panel of the Veterans Court dismissed Henderson's case for lack of jurisdiction. *Id.* at 74a-83a. The majority concluded that under *Bowles*, Section 7266(a)'s 120-day time limit is a jurisdictional deadline and thus not subject to equitable tolling. *Id.* at 76a-82a. Judge Schoelen dissented, arguing that *Bowles* did not cast doubt on the Federal Circuit's en banc decisions in *Bailey* and *Jaquay*. *Id.* at 84a-92a.

c. Following argument before a panel of the Federal Circuit, the court of appeals *sua sponte* ordered rehearing en banc "to determine whether, in light of *Bowles*, [the court of appeals] should overrule *Bailey* and *Jaquay*." *Id.* at 2a.[1] On December 17, 2009, a divided court answered that question in the

1. Five veterans groups filed *amicus* briefs in support of Henderson. *See Henderson v. Shinseki*, 589 F.3d 1201, 1202 (2009).

affirmative, overturned *Bailey* and *Jaquay*, and affirmed the dismissal of Henderson's Veterans Court action for lack of jurisdiction. *Id.* at 1a-73a.

i. The majority set out its understanding of the governing legal framework: "In *Bowles*, the Supreme Court 'ma[d]e clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement.'" *Id.* at 25a (quoting *Bowles*, 551 U.S. at 214). The majority reasoned that "Section 7266(a) is a notice of appeal, or time of review, provision in a civil case." *Id*. The majority thus held that, "in line with *Bowles*, . . . because [Section] 7266(a) is a time of review provision, it is jurisdictional and . . . because Congress has not so provided, the statute is not subject to equitable tolling." *Id.*

The majority acknowledged "that Mr. Henderson's appeal to the Veterans Court represented the first time he could appear before a court." *Id.* at 26a. It nonetheless concluded that the 120-day time limit for instituting suit was not a statute of limitations because proceedings before the Veterans Court share "characteristics of appellate review." *Id.* at 27a. The majority pointed to Section 7266(a)'s title, "Notice of Appeal," and the fact that the veteran files a "notice of appeal" to obtain "review" of the agency's denial of benefits. *Id.* at 26a-27a (quoting 38 U.S.C. § 7266(a)). The majority also reasoned that the Veterans Court "*review*[*s*]" the Board's decision; applies a clearly-erroneous standard to the facts; is restricted to the record before the agency; considers the rule of prejudicial error; and can only reverse, modify, or affirm the agency's decision. *Id.* (quoting 38 U.S.C. § 7252(a)).

Based on the above considerations, the majority declined to apply the presumption of *Irwin* that time limits for suing the government are subject to equitable tolling. The majority reasoned that *Bowles* had reversed *Irwin*'s presumption with respect to suits involving judicial review of agency action:

> The critical point is that, whereas in *Bailey* we relied on *Irwin* to conclude that time of review provisions are subject to equitable tolling unless Congress has expressed a contrary intent, *see* 160 F.3d at 1365-66, in *Bowles* the Court reached the conclusion that because time of review provisions are mandatory and jurisdictional, they *are not* subject to equitable tolling unless Congress so provides, *see* 551 U.S. at 212-13.

Pet. App. 33a-34a.

ii. Judge Dyk, joined by Judges Gajarsa and Moore, concurred, writing separately to express the view that "the rigid deadline of the existing statute can and does lead to unfairness . . . particularly . . . in the many cases where the veteran is not represented by counsel during the process at the Veterans Administration and/or is suffering from a mental disability." *Id.* at 44a. Judge Dyk observed that "these circumstances can make it extremely difficult for the veteran to navigate the system and meet the statutory deadline." *Id.*

iii. Judge Mayer, joined by Chief Judge Michel and Judge Newman, filed a vigorous dissent. *Id.* at 46a-73a.

The dissent explained that "the majority's eradication of equitable tolling creates a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." *Id.* at 46a. In other words, "the veteran who incurs the most devastating service-connected injury . . . will be both 'out of luck and out of court,' since failure to comply with the 120-day deadline prescribed in 38 U.S.C. § 7266(a) means that he forfeits all right to judicial review of his claim." Pet. App. 46a-47a.

The dissent explained that the majority erred in departing from the Federal Circuit's long-settled view that Section 7266(a) is a statute of limitations subject to equitable tolling. *Id.* at 47a-48a. The dissent reasoned that the prior cases were dictated by *Bowen v. City of New York*, 476 U.S. 467 (1986), which unanimously held that the deadline for seeking judicial review of an agency denial of social security benefits was a limitations period, and by *Irwin*, 498 U.S. at 95-97, which held that the time limit for challenging an adverse decision by the Equal Employment Opportunity Commission (EEOC) was a limitations period. Pet. App. 52a-53a.

The dissent also criticized the majority for relying on *Bowles*, which the dissent described as a "flimsy foundation" "for casting aside [the court's] long-established equitable tolling jurisprudence." *Id.* at 47a-48a. Finally, the dissent explained that the plain language and legislative history of Section 7266(a) show that Congress did not intend to create a jurisdictional bar immune from the doctrine of equitable tolling. *Id.* at 58a-61a, 66a-68a.

REASONS FOR GRANTING THE PETITION

Whether the Veterans Court is foreclosed under any circumstances from tolling the time limit for filing suit against the Secretary to challenge a disability benefit denial is a recurring issue that is important to the administration of the veterans disability benefits program. Because many veterans, like petitioner, have a disability that prevents them from meeting the statutory time limit for bringing suit, the Federal Circuit's decision frequently will bar veterans from obtaining even one level of judicial review. Indeed, the Veterans Court already has dismissed over two hundred cases brought by veterans based on this case.

Beyond the critical importance to disabled veterans nationwide, the Federal Circuit manifestly erred in holding that the time limit in Section 7266(a) limits the *jurisdiction* of the Veterans Court. The statutory text, structure, and purpose all compel the conclusion that Section 7266(a)'s time limit constitutes a statute of limitations for bringing suit against the government. Under the default rule of *Irwin*, the 120-day time limit is subject to equitable tolling.

This Court's unanimous decision in *Bowen*, 476 U.S. 467, confirms the court of appeals' fundamental error. *Bowen* holds that the statutory time limit governing appeal of an agency denial of social security disability benefits is subject to equitable tolling. The social security disability benefits scheme is identical in all relevant respects to the scheme for veterans disability benefits. There is no reasoned basis to permit equitable tolling for social security claimants but bar equitable

tolling for *veterans* who similarly seek review of an agency denial of disability benefits.

The majority's dispositive reliance on *Bowles* is flawed at every turn: a veteran's commencement of a suit to challenge an adverse final agency decision is markedly unlike the court-to-court appeal at issue in *Bowles*. *Bowles* does not mention *Irwin* or *Bowen*, much less cast doubt on the continuing validity of those precedents. The Federal Circuit's serious misreading of *Bowles* calls out for correction by this Court.

A. The Question Presented Is Recurring and Important

This case presents a recurring and important issue with far-reaching implications for a nationwide program that provides benefits to millions of disabled veterans. Allowed to stand, it will result in the denial of benefits to countless veterans who have meritorious disability claims.

1. Because the Federal Circuit has exclusive jurisdiction to review decisions of the Veterans Court, 38 U.S.C. § 7292(c), no circuit conflict can arise on the issue of whether equitable tolling is available under Section 7266(a). The decision below has nationwide effect and, if uncorrected by this Court, will bar many veterans from obtaining judicial review of benefit denials.

Congress and the Executive Branch have recognized the Nation's core commitment to caring for disabled veterans.[2] And this Court traditionally grants review in cases involving important questions related to the administration of the VA program. *See, e.g.*, *Sanders*, 129 S. Ct. at 1704 (reviewing prejudicial error standard applied in Veterans Court cases); *Brown v. Gardner*, 513 U.S. 115, 116 (1994) (reviewing VA regulation requiring proof by claimant that VA's negligent treatment caused disability).

2. The question presented in this case has a direct and immediate impact on the ability of disabled veterans to obtain disability benefits. There are 23 million

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2. Legislation providing relief to disabled veterans

> has been traced to Elizabethan England and a statute providing pensions to veterans who had served since 1588, the year of the Spanish Armada. The American colonies continued this tradition of providing pensions to maimed and disabled soldiers, and shortly after the Declaration of Independence, the Continental Congress promised to provide pensions to those disabled in the cause of American independence.

H.R. Rep. No. 100-963, at 9 (1988) (citation omitted); *see Brown*, 513 U.S. at 309. The President also recently remarked at Arlington National Cemetery in honor of Veterans Day: "To all our wounded warriors, and to the families who laid a loved one to rest. America will not let you down. We will take care of our own." Remarks by the President at Arlington National Cemetery (Nov. 11, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-veterans-day-arlington-national-cemetery (last visited Feb. 16, 2010).

veterans in the United States and Puerto Rico,[3] and the VA currently provides disability benefits to almost 4 million veterans and their dependents.[4] In 2009 alone, the VA received more than 1 million applications for such benefits.[5] Each year, veterans file thousands of Veterans Court cases challenging the VA's denial of benefits.[6] Most veterans who file suit against the Secretary in Veterans Court—between 53 and 70 percent annually since 2000—do so *pro se*. *See* Veterans Ct. Rept., *supra* n.6, at 1.

In the overwhelming majority of Veterans Court cases, the veteran prevails. Since 2001, veterans on average have prevailed at least in part in *80 percent* of the cases decided on the merits. *Id.*[7] That dramatic statistic demonstrates that Veterans Court review is critical to ensuring, as Congress intended, that veterans receive the benefits to

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3. U.S. Dep't of Veterans Affairs, *FY 2011 Budget Submission*, *Vol. 1: Summary Vol.* at 1E-1 (2010), *available at* http://www4.va.gov/budget/docs/summary/Fy2011_Volume_1-Summary_Volume.pdf.

4. U.S. Dep't of Veterans Affairs, *FY 2009 Performance and Accountability Report*, *Executive Summary* (2009), *available at* http://www4.va.gov/budget/docs/report/FY2009-VAPAR_Executive_Summary.pdf.

5. *Id.*

6. Court of Appeals for Veterans Claims, *Annual Reports* (2000-2009) ("Veterans Ct. Rept."), *available at* http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf.

7. In 2001, veterans prevailed in whole or in part in 96 percent of Veterans Court cases decided on the merits; in 2002, 72 percent; in 2003, 91 percent; in 2004, 84 percent; in 2005, 73 percent; in 2006, 76 percent; in 2007, 64 percent; in 2008, 79 percent; and in 2009, 81 percent. Veterans Ct. Rept., *supra* n.6, at 1.

which they are entitled. Further, many of the remands are on joint motion of the parties,[8] including where the government concedes administrative error.[9] Along the same vein, the Veterans Court awards the veteran attorneys fees *more than 50 percent of the time* because the government's position was not "substantially justified" (28 U.S.C. § 2412(d)(1)(A)). Veterans Ct. Rept., *supra* n.6, at 1. By abolishing equitable tolling, the decision below denies veterans review of an erroneous decision, even where the Secretary would otherwise concede error and would be required to pay attorneys fees.

The practical import of the decision below, then, is that the courthouse doors will be shut to untold numbers of veterans with otherwise meritorious benefits claims if they miss the time limit even by one day through no fault of their own. This is particularly the case for veterans like Henderson suffering "the most devastating service-connected injur[ies]," who often are "the least able to comply with rigidly enforced filing deadlines." Pet. App. 46a (Mayer, J., dissenting). Indeed, a Westlaw search reveals that since August 14, 2008, when the Veterans Court first held that *Bowles* required the elimination of equitable tolling under Section 7266(a), that court has

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8. *See Battling the Backlog, Part II: Challenges Facing the U.S. Court of Appeals for Veterans' Claims: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 89-90 (2006) (statement of Randall Campbell, Assistant General Counsel, Professional Staff Group VII, Department of Veterans Affairs), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:29716.pdf.

9. *See, e.g.*, *Howard v. Shinseki*, No. 08-3606E, 2010 WL 318531, at *2 (Vet. App. Jan. 28, 2010); *Bartlett v. Nicholson*, 21 Vet. App. 415, 2006 WL 3200849, at *2 (Sept. 8, 2006); *Zuberi v. Nicholson*, 19 Vet. App. 541, 546-47 (2006).

dismissed at least 226 cases as untimely. Even in the short time since the Federal Circuit's decision on December 17, 2009, the Veterans Court has dismissed at least 31 cases as untimely.

3. The import of this case is further highlighted by the United States's position in an analogous case involving veterans' claims. The United States urged this Court to grant review of the Federal Circuit's decision in *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir.) (en banc), *cert. denied*, 552 U.S. 948 (2007). *Kirkendall* held that equitable tolling is available under the statutory time limit to file a veterans-preference claim with the Merit Systems Protection Board (MSPB) under the Veterans Employment Opportunities Act of 1998 (VEOA). *Id.* at 833. The government requested that the Court grant, vacate, and remand in light of *Bowles* or, in the alternative, grant plenary review. Petition for a Writ of Certiorari, *Dep't of the Army v. Kirkendall*, 552 U.S. 948 (2007) (No. 07-19).

The government argued that the case warranted this Court's review because (1) the question at issue "is a recurring one of threshold importance to the administration of the VEOA's remedial scheme"; and (2) based on the Federal Circuit's exclusive jurisdiction, "no circuit conflict will arise on the availability of equitable tolling . . . and the Federal Circuit's holding that equitable tolling is available will have nationwide effect." *Id.* at 22-23. The government also observed that the decision had already affected the administration of the statutory scheme. *Id.* at 23. Each of these reasons applies with greater force here.

Although the Court denied review in *Kirkendall*, 552 U.S. at 948, that case was significantly less worthy of review for several reasons. The Federal Circuit's decision in *Kirkendall* was in line with the pro-claimant VA scheme and recognized that the time limit for seeking MSPB review is *not* jurisdictional but rather *is* subject to equitable tolling. 479 F.3d at 842. Further, there was no opportunity for this Court to review the Federal Circuit's reading of *Bowles* because *Kirkendall* was decided before *Bowles*. Counsel for the veteran also argued that *Kirkendall* was an interlocutory decision that involved a relatively small number of veterans whose requests for review occupied an insignificant portion of the MSPB's docket. *See* Brief in Opposition at 18, 19-20, *Kirkendall*, 552 U.S. 948 (No. 07-19).

By contrast, the Federal Circuit in this case effected a drastic change in the *status quo* by holding that *Bowles required* the reversal of two prior en banc decisions. Here, the decision is final and involves a benefits program that affects an exponentially larger group of veterans. Further, because *Kirkendall* relied on *Bailey*, one of the decisions overruled in this case, the court of appeals likely will extend *Bowles* to the VEOA context, such that veterans whose severe disabilities prevent a timely filing will be denied review of both disability benefits and employment preferences. Accordingly, if the government viewed *Kirkendall* as worthy of this Court's review, *a fortiori*, the question presented in this case warrants review. Any change of heart by the government now would be a heads-I-win-tails-you-lose slap in the face to the disabled veterans who suffer injuries while serving this Nation.

B. The Federal Circuit's Decision Is Wrong

This Court has long recognized the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (citing *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 285 (1946)). Thus, "interpretive doubt is to be resolved in the veteran's favor." *Brown*, 513 U.S. at 117-18; *see Sanders*, 129 S. Ct. at 1707 ("[W]e recognize that Congress has expressed special solicitude for the veterans' cause."); *id.* at 1709 (Souter, J., dissenting) (noting "Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions").

The pro-veteran canon of construction applies with full force to Section 7266(a). "The basic purpose of [the Veterans' Judicial Review Act] is to ensure that veterans and other claimants before the VA receive all benefits to which they are entitled." S. Rep. No. 100-418, at 29. "The [Act] is designed to serve that purpose by providing such claimants with an opportunity for judicial review of final decisions of the Board of Veterans' Appeals (BVA) denying claims for benefits." *Id.*; *see id.* at 31 ("This legislation is designed to ensure that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives from the VA every benefit and service to which he or she is entitled under law."); H.R. Rep. No. 100-963, at 13 (expressing congressional intent "to maintain a beneficial non-adversarial system of veterans benefits" and "to resolve all issues by giving the claimant the benefit of any reasonable doubt").

With the pro-veteran canon and statutory purpose in mind, Section 7266(a) cannot be read to impose a jurisdictional deadline. Rather, the provision constitutes a 120-day statute of limitations for a veteran to bring suit against the United States. As such, the limitations period may be equitably tolled under the presumptive rule of *Irwin*, 498 U.S. at 95-96.

1. Section 7266(a) is a statute of limitations for bringing suit against the Secretary for veterans benefits

Section 7266(a) provides:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

Four features of the statute confirm that Section 7266(a) is a statute of limitations. *First*, Section 7266(a) establishes the time limit for a veteran to *commence* a civil action against the Secretary. A time limit for bringing a court action in the first instance is naturally viewed as a statute of limitations. *See Black's Law Dictionary* 1546 (9th ed. 2009) (defining "statute of limitations" as "a statute establishing a time limit for suing in a civil case"). As the Federal Circuit explained in *Jaquay*, "the filing of a notice of appeal at the Veterans Court, like the filing of a complaint in trial court, is the

first action taken by a veteran in a court of law." 304 F.3d at 1286. Even the majority below recognized that Henderson's "appeal to the Veterans Court represented the first time he could appear before a court." Pet. App. 26a. By contrast, "[i]n the veterans' adjudicatory system, an appeal from the Veterans Court to [the Federal Circuit] is the procedural equivalent of an appeal from a district court to a court of appeals." *Id*. at 51a (Mayer, J., dissenting).

Second, the text of Section 7266(a) limits the action a *veteran* must take to file suit. The text does not express any limit on the jurisdiction or power of the Veterans Court. 38 U.S.C. § 7266(a) ("a person . . . shall file"). Absent any text reflecting a restriction on the court's jurisdiction, the pro-veteran canon of construction alone requires interpreting the provision as establishing a limitations period. *See Kirkendall*, 479 F.3d at 843 ("Even if this were a close case . . . the canon that veterans' benefits statutes should be construed in the veteran's favor would compel us to find that [a statutory time limit] is subject to equitable tolling.").

Third, the statutory structure reflects that Congress did not intend the 120-day time limit to operate as a restriction on the jurisdiction of the Veterans Court. Section 7266(a) does not appear in the subchapter that establishes and confines the Veterans Court's jurisdiction. Title 38, chapter 72 of the United States Code establishes the Veterans Court. Subchapter I, entitled "Organization and Jurisdiction," includes the jurisdictional prerequisites for filing in Veterans Court. In particular, Section 7252, entitled "Jurisdiction; finality of decisions," states that the Veterans Court has

"exclusive jurisdiction to review decisions of the [Board]." 38 U.S.C. § 7252(a).

By contrast, Congress placed Section 7266(a) in the subchapter describing "Procedure" for the Veterans Court. That subchapter contains provisions on "Rules of practice and procedure," *id.* § 7264, and other housekeeping matters. *E.g.*, *id.* §§ 7261-7269. The placement of Section 7266(a) in the subchapter dealing with "procedure" is consistent with the Federal Circuit's pre-*Bowles* precedent that the 120-day time limit is a "statute of limitations." *Jaquay*, 304 F.3d at 1288-89; *cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (describing "statutes of limitations" as among the "procedural requirements for triggering the right to an adjudication").

Fourth, Congress's purpose in enacting the provision was to ensure that veterans could obtain judicial review of benefit denials. S. Rep. No. 100-418 at 29, 31; H.R. Rep. No. 100-963 at 13, 26. The decision below defeats that purpose. Indeed, an inflexible jurisdictional bar to initial court review—one that denies veterans with meritorious claims any opportunity to be heard in any court—would be a uniquely anti-veteran provision within an otherwise pro-veteran statutory scheme. The Federal Circuit's interpretation would prevent *all* veterans in *all* cases from obtaining equitable tolling of the 120-day time limit, regardless of circumstances. Pet. App. 33a-34a. For instance, the court's rule would apply even where, as here, the condition preventing a veteran from filing within 120 days is the same disability for which the veteran seeks benefits, *id.*, or even where the VA affirmatively

misleads the veterans as to the filing deadline, *Bailey*, 160 F.3d at 1361-62. Congress could not have intended those results.

2. The court of appeals' decision conflicts with *Bowen* and *Irwin*

a. In *Bowen*, 476 U.S. at 478-81, this Court unanimously held that equitable tolling is available under the statutory time limit for seeking judicial review of a final agency decision denying a claim for social security disability benefits. That statute, 42 U.S.C. 405(g), is in all material respects identical to Section 7266(a):

> Any 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 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.

42 U.S.C. § 405(g) (emphasis added). Section 405(g) by its plain terms is "a time of review provision." Pet. App. 25a. The majority's holding that "because [Section] 7266(a) is a time of review provision, it is jurisdictional," *id.*, directly conflicts with *Bowen*'s holding that a time of review provision for agency action denying disability benefits is *not* jurisdictional.

Moreover, Section 405(g), like Section 7266(a), addresses the action a claimant must take and is not framed as a limit on the reviewing court's jurisdiction. Both time limits, moreover, appear in statutory provisions addressed to "procedure" rather than to the court's jurisdiction. 42 U.S.C. § 405 (entitled, "Evidence, procedure, and certification for payments"); 38 U.S.C. § 7266 (appearing in subchapter of statutory scheme governing Veterans Court entitled "Procedure.").[10]

The government in *Bowen* argued, as in this case, that equitable tolling was unavailable because Section 405(g) "sets the bounds of the [reviewing court's] jurisdiction." *Bowen*, 476 U.S. at 478. This Court rejected that argument, holding that "the 60-day requirement is not jurisdictional, but rather constitutes a period of limitations." *Id.* The Court explained that equitable tolling was "consistent with Congress' intent in enacting [the] particular statutory scheme" for providing social security disability benefits to eligible claimants. *Id.* at 479. The Court also reasoned that "Congress designed [the statutory scheme for social security disability benefits] to be 'unusually protective' of claimants." *Id.* at 480 (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)). The same is true here.

There is no basis to conclude that the time limit for seeking judicial review of an agency denial of social security benefits is a limitations period, but that the time

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10. After holding that Section 405(g) is a statute of limitations, *Bowen* observed that the Secretary's ability to extend the limit was consistent with congressional intent to permit equitable tolling. 476 U.S. at 476, 480.

limit for seeking judicial review of an agency denial of veterans benefits is jurisdictional. Congress, rather, created the Veterans Court to provide judicial review to *eliminate* "unwarranted distinctions that exist between protections accorded to veterans and claimants for Federal benefits from other agencies." S. Rep. No. 100-418 at 31.

The social security and veterans' disability benefits programs share a "marked similarity." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002). Both programs involve claims for federal disability benefits, and both administrative processes are non-adversarial and pro-claimant. *Compare Sanders*, 129 S. Ct. at 1707 ("[T]he adjudicatory process is not truly adversarial, and the veteran is often unrepresented during the claims proceedings") *with Sims v. Apfel*, 530 U.S. 103, 107 (2000) ("[T]he SSA 'conduct[s] the administrative review process in an informal, nonadversary manner.'" (citations omitted)). Indeed, the government itself recently relied on the similarity between the two schemes in arguing to this Court that "[t]here is no reason to apply a different rule" for veterans and social security disability claimants. Brief for the Petitioner at 25, *Sanders*, 129 S. Ct. 1696 (2009) (No. 07-1209) (rule of prejudicial error).[11]

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11. The veterans' scheme is nothing like the adversarial immigration scheme at issue in *Stone v. INS*, 514 U.S. 386 (1995), a decision cited by the majority. Pet. App. 14a, 26a. *Stone* stated that the time limit for an undocumented alien to challenge a civil deportation order in a circuit court of appeals was jurisdictional. 514 U.S. at 405-06. A veteran, however, does not challenge the agency's decision in the court of appeals but does

(Cont'd)

b. The majority's decision is also inconsistent with *Irwin*, 498 U.S. at 95-96, which held that a veteran, following the EEOC's denial of a discrimination claim, may be excused under the doctrine of equitable tolling from the "statutory time limit" for suing the VA. In holding that the deadline was a statute of limitations subject to equitable tolling, the Court expressly relied on *Bowen*. *Irwin*, 498 U.S. at 94. The statutory schemes in *Irwin*, in *Bowen*, and here are functionally parallel. The statutory provision in each instance specifies the time limit for filing an initial claim in court and therefore acts as a restriction on an individual's claim, not on the jurisdiction of the court. Furthermore, *Irwin* held that statutes of limitations in suits against the government are presumptively subject to equitable tolling. *Id.* at 95-96. The Federal Circuit's rule in this case turns that presumption on its head by imposing a uniquely anti-veteran rule that would require Congress expressly to authorize courts to apply equitable tolling when veterans bring suit against the United States. Pet. App. 29a-30a; *cf. id.* at 44a-45a (Dyk, J., concurring) (expressing view that it was Congress's responsibility to amend the statute).

It would be highly incongruous to excuse veterans under equitable circumstances from the time requirements for bringing employment actions under

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(Cont'd)

so in the Veterans Court, whose decision is then subject to further review by the court of appeals. Moreover, this case, like the social security context, involves denial of a benefit. It is implausible that Congress intended to treat a disabled veteran seeking a benefit like an undocumented alien facing deportation. Pet. App. 53a-54a (Mayer, J., dissenting).

Title VII against the Secretary, *Irwin*, 498 U.S. at 95-96, yet hold them to an unyielding deadline for initiating suit under a statutory scheme created with pro-veteran intentions. This Court's review is warranted to correct the Federal Circuit's subversion of Congress's intent.

3. *Bowles* is inapposite

Bowles held that the time limits in Federal Rule of Appellate Procedure ("Rule") 4 and 28 U.S.C. § 2107(a) for a litigant to appeal a federal district court judgment to a circuit court of appeals are "jurisdictional" and thus not subject to extension based on equitable circumstances. *Bowles*, 551 U.S. at 209. The Federal Circuit held that *Bowles* announced a *per se* rule that any "appellate" deadline in any civil case is jurisdictional when it stated that "[t]oday we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." Pet. App. 33a-34a (quoting *Bowles*, 551 U.S. at 214). The majority reasoned that because the veteran brings a civil suit by filing a "notice of appeal" in the Veterans Court, which "reviews" agency action, Section 7266(a) is a "time of review" provision that under *Bowles* is jurisdictional. *Id.* at 25a. The majority likewise agreed with the government that Section 7266(a) "is jurisdictional because it identifies the point at which the subject-matter jurisdiction of the lower court or tribunal ends and that of the appellate court begins." *Id.* at 23a-24a.

a. The majority wrenched the quoted passage from *Bowles* out of context and woodenly extended the passage to the veterans context as if it were a statute. But this Court does not "parse the text" of its opinions

"as though that were itself the governing statute." *Comm'r v. Bollinger*, 485 U.S. 340, 349 (1988); *see Nevada v. Hicks*, 533 U.S. 353, 372 (2001). Not surprisingly, the majority's logic breaks down at each level of the analysis, because there is a world of difference between an appeal from a district court to a circuit court of appeals, and an *initial suit* against the government in the *pro-veteran* context.

First, the Board acting for the Secretary is not a lower court or even a court at all. To the contrary, the entire administrative claims process, including at the Board, is non-adversarial. *Walters*, 473 U.S. at 309-12; 38 C.F.R. § 20.700(c). By contrast, district court proceedings are adversarial. Pet. App. 72a-73a (Mayer, J., dissenting) ("So while Bowles, a convicted murderer, had several opportunities to present his case in a court of law, Henderson will have none.").

This Court has specifically "warned against reflexively 'assimilating the relation of . . . administrative bodies and the courts to the relationship between lower and upper courts.'" *Sims*, 530 U.S. at 110 (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940)); *accord id.* ("'[I]t is well settled that there are wide differences between administrative agencies and courts.'" (quoting *Shepard v. NLRB*, 459 U.S. 344, 351 (1983)). Yet the majority reflexively treated the Board within the agency as a lower "tribunal" whose "jurisdiction" is divested when a case is "transfer[red]" to the Veterans Court. Pet. App. 23a-24a, 37a. The Board is functionally identical to the Appeals Council (or an ALJ) that makes a final decision denying social security benefits, *Sims*, 530 U.S. at 105, and the EEOC that makes a final

decision rejecting a federal employee's discrimination claim, 29 C.F.R. §§ 1614.405, 1614.407(c). In all of those instances the litigant's suit simply takes the matter out of an agency; the suit does not transform the agency into a lower court.

Second, a veteran who initiates suit in the Veterans Court appears for the first time in court against the Secretary—the first adversarial proceeding in the veteran's pursuit of benefits. The Veterans Court thus operates more like the district court in *Bowen* and *Irwin* than the circuit court of appeals at issue in *Bowles*. Pet. App. 54a-55a (Mayer, J., dissenting). Indeed, the notice to challenge the Board's decision under Section 7266(a) is filed *in the Veterans Court*, 38 U.S.C. § 7266(a), reflecting that the notice operates as a complaint. *Compare* Rule 4(a)(1)(A) (to challenge a district court decision, the notice of appeal is filed in the district court).

The Veterans Court's 80 percent combined reversal and remand rate for Board's decisions (p. 14, *supra*) further illustrates that the Veterans Court does not function like a circuit court of appeals. The combined reversal and remand rate of the circuit courts for district court decisions is typically between 12 percent and 16 percent.[12] And by equating an initial request for judicial review of agency action with a traditional circuit court appeal, the majority's decision creates another anomaly: although Section 7252(a) creates a cause of action for judicial review of a final agency decision denying

12. Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts*, at table B-5 (2000-2008), *available at* http://www.uscourts.gov/judbususc/judbus.html.

disability benefits, the decision below leaves no room for any statute of limitations for that claim. *Bowen* held that Section 405(g)'s time limit for seeking judicial review of the denial of social security benefits is not jurisdictional and therefore refutes the court of appeals' holding that *Bowles* renders all "time of review" provisions jurisdictional. Pet. App. 25a.

Third, the majority's opinion erroneously elevates form over substance by placing talismanic significance on the word "appeal" in the text and title of Section 7266(a). A veteran appeals the Board's decision not in a jurisdictional sense, but in the sense of challenging the Secretary's decision in court. That situation is no different than when a social security claimant appeals the Commissioner's disability benefits denial by filing suit in district court. *See, e.g.*, *Torres v. Barnhart*, 417 F.3d 276, 283 (2d Cir. 2005) (an "appeal of Commissioner's final decision must be filed within 60 days"); *Snyder v. Barnhart*, 212 F. Supp. 2d 172, 174 (W.D.N.Y. 2002) ("This is an action brought pursuant to 42 U.S.C. § 405(g) in appeal of the [Commissioner's] final decision."). This Court likewise has used the term "appeal" as meaning a challenge. *Heckler*, 467 U.S. at 107 ("[I]f the claimant is dissatisfied with the decision of the ALJ, he may take an *appeal* to the Appeals council of [HHS]." (emphasis added)).

Congress's use of the term "appeal" in other provisions of the statute confirms its non-jurisdictional meaning. Congress repeatedly employed the terms "appeal," "appellate review," and "appellant" in the layman's sense to refer to a veteran's non-adversarial

request for review within the agency. *See, e.g.*, 38 U.S.C. §§ 7104(a) (Board hears "appeals" of regional office decisions); 7105(a) ("appellate review" is initiated before Board); 7106 ("right of review of appeal" before Board); 7107(d)(1) (veteran is "appellant" before Board even though Secretary does not appear); 7108 (referring to "an application for review on appeal" before Board). Similarly, the name of the Board of Veterans' Appeals likely conveys that the Board decides challenges to initial agency denials of disability benefits.

Because Congress established the administrative benefits process to be pro-veteran and non-adversarial, and expected veterans to navigate the process without legal representation, *Sanders*, 129 S. Ct. at 1707, it strains credulity to conclude that Congress intended the word "appeal" in this context to have the formal jurisdictional significance as in 28 U.S.C. § 2107(a) and Rule 4.

The Federal Circuit finally erred in relying on the "characteristics of appellate review" in Veterans Court proceedings. Pet. App. 27a. The majority pointed to the deferential standard of review applied by the Veterans Court. *Id.* at 27a-28a. That standard, however, merely reflects Congress's desire that the court defer to the agency in certain circumstances. It does not mean that Congress intended the 120-day time limit to be jurisdictional. Indeed, the same standard of judicial review applies in the social security context. 42 U.S.C. § 405(g) ("The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner . . . The findings of the Commissioner . . .

as to any fact, if supported by substantial evidence, shall be conclusive"); *see also* Brief for the Petitioner at 25, *Sanders*, 129 S. Ct. 1696 (No. 07-1209) (setting forth social security rule of prejudicial error).

b. There is also an important textual distinction between Section 7266(a) and Section 2107(a). Section 7266(a) directs *the veteran* to take action and does not purport to limit the Veterans Court's power at all. By contrast, Section 2107(a)'s text limits the circuit court of appeals' power. 28 U.S.C. § 2107(a) ("no appeal shall bring any judgment . . . of a civil nature before a circuit court of appeals for review" unless a notice of appeal is filed within 30 days). Moreover, unlike Section 7266(a), Section 2107(c) specifies the precise amount of time a court may extend the filing deadline. *Bowles*, 551 U.S. at 213 ("Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple 'claim-processing rule.'").

c. *Bowles* is also inapposite because the Court relied on the "longstanding treatment"—dating to the mid-nineteenth century—of time limits for a traditional appeal from a district court as "jurisdictional" in nature. *Bowles*, 551 U.S. at 209-10 (citations omitted). There is no comparable tradition for statutory time limits on seeking judicial review of non-adversarial administrative decisions that are the product of a uniquely pro-claimant statutory scheme. To the contrary, for more than two decades this Court has held that such time limits are non-jurisdictional and subject to equitable tolling. *Bowen*, 476 U.S. at 478. And for over a decade, the Federal Circuit agreed. *Jaquay*, 304 F.3d at 1285-89; *Bailey*, 160 F.3d at 1364-68.

d. Finally, unlike *Bowles*, application of equitable tolling of the 120-day time limit under Section 7266(a) by an Article I court does not implicate any of the separation of powers concerns implicit in the federal courts' interpretation of statutes establishing their own jurisdiction. *See Bowles*, 551 U.S. at 212-13 (stating that the Court's decision "follows naturally" from the principle that "[w]ithin constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider"). Because Congress established the Veterans Court as an Article I court, there is no risk of an Article III court overstepping *its own* bounds by allowing equity to increase the cases that the Veterans Court can hear. To the contrary, depriving the Veterans Court of the power to apply equitable tolling utterly defeats Congress's pro-veteran intent in creating the Veterans Court in the first place.

* * *

The decision below drastically alters the rights of veterans to obtain judicial review of agency decisions denying benefits. "Eliminating equitable tolling deprives deserving veterans of the leniency they are due and makes a mockery of the pro-claimants adjudicatory scheme Congress intended to create." Pet. App. 73a (Mayer, J., dissenting). The doctrine of equitable tolling is particularly necessary in this context because veterans typically appear *pro se* and their disabilities may prevent a timely request for review. Only this Court can consider whether the court of appeals erroneously read this Court's decision in *Bowles* to overrule *Irwin*'s application to a veteran's suit to challenge an agency denial of disability benefits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED DECEMBER 17, 2009

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-7006

DAVID L. HENDERSON,

Claimant-Appellant,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs,

Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in 05-0090, Chief Judge William P. Greene, Jr.

DECIDED: December 17, 2009

Before MICHEL, Chief Judge, NEWMAN, MAYER, LOURIE, RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, PROST, and MOORE, Circuit Judges.

SCHALL, *Circuit Judge*.

This is a veterans case. It involves 38 U.S.C. § 7266(a). Pursuant to that statute, a veteran may appeal a final decision of the Board of Veterans' Appeals

("Board") to the United States Court of Appeals for Veterans Claims ("Veterans Court") within 120 days after the date on which notice of the Board's decision is mailed. In this case, veteran David L. Henderson appeals the decision of the Veterans Court which dismissed his appeal of an adverse Board decision for lack of jurisdiction, on the ground that the appeal was untimely. *Henderson v. Peake*, 22 Vet. App. 217 (2008). In arriving at its decision, the court held that the 120-day appeal period set forth in § 7266(a) is not subject to equitable tolling. It was the view of the Veterans Court that the decision of the Supreme Court in *Bowles v. Russell*, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007), had abrogated the decision of this court in *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc). In *Bailey*, we held that § 7266(a) is subject to equitable tolling. Following argument before a panel, we decided to rehear Mr. Henderson's appeal en banc, in order to determine whether, in light of *Bowles*, we should overrule *Bailey* and *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc). In *Jaquay*, we followed *Bailey* and held that the misfiling of a motion for reconsideration before the Board equitably tolls the period for filing a notice of appeal with the Veterans Court. Today, for the reasons set forth below, based on *Bowles*, we expressly overrule *Bailey* and *Jaquay's* holdings that the time period set forth in § 7266(a) is subject to equitable tolling. We therefore affirm the decision of the Veterans Court dismissing Mr. Henderson's appeal for lack of jurisdiction.

Appendix A

BACKGROUND

Mr. Henderson served on active military duty from 1950 to 1952. He was discharged in 1952 after being diagnosed with paranoid schizophrenia, for which he has established service connection and currently has a 100% disability rating. In August of 2001, Mr. Henderson filed a claim for monthly compensation with the Department of Veterans Affairs ("VA") Regional Office ("RO"), based on his need for in-home care. The RO denied the claim, and Mr. Henderson appealed to the Board. The appeal was denied on August 30, 2004. Thereafter, on January 12, 2005, Mr. Henderson filed a notice of appeal with the Veterans Court, fifteen days after the expiration of the 120-day appeal period set forth in 38 U.S.C. § 7266(a). Section 7266(a) provides as follows:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.[1]

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1. In pertinent part, § 7104(e) of Title 38 provides:

   (e)(1) After reaching a decision on a case, the Board shall promptly mail a copy of its written decision to the claimant at the last known address of the claimant.

In 2005, the Veterans Court entered two orders asking Mr. Henderson to explain why his appeal should not be dismissed as untimely. Mr. Henderson responded that his failure to timely appeal was a direct result of his illness, and he asked that the court allow for equitable tolling in light of *Bailey*.

In March of 2006, in a single-judge decision, the Veterans Court held that equitable tolling was inappropriate in Mr. Henderson's case, and dismissed his appeal as untimely. Subsequently, however, the court appointed pro bono representation to Mr. Henderson and revoked its initial order, reassigning the appeal to a panel. While Mr. Henderson's appeal was pending, the Supreme Court rendered its decision in *Bowles*, in which it stated that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," and thus cannot be waived. 551 U.S. at 214. The Court also stated that it had "no authority to create equitable exceptions to jurisdictional requirements." *Id.* The Veterans Court requested additional briefing on whether *Bowles* had abrogated our en banc decision in *Bailey*.

On July 24, 2008, the Veterans Court ruled in a 2-1 decision that the holding in *Bowles* prohibited it from using equitable tolling to extend the 120-day appeal period set forth in § 7266(a). *Henderson*, 22 Vet. App. at 221. The court determined that Congress had "specifically authorized" it to conduct "independent judicial *appellate review*" of the Board, and that well-settled law established that its cases were "civil actions." *Id.* at 220. Starting from that premise, the court

concluded that § 7266(a) was a notice of appeal provision in a civil case, and that it was jurisdictional and could not be equitably tolled. *Id.* at 220-21. Accordingly, the court ruled that our precedent in *Bailey* was effectively overruled, and it dismissed Mr. Henderson's appeal for lack of jurisdiction. *See id.* at 218-20 (discussing *Bailey*). Judge Schoelen dissented, stating that the majority had failed to explain how *Bowles* changed the analysis of the governmental waiver of sovereign immunity that the Federal Circuit undertook in *Bailey* and reaffirmed in Jaquay. *Id.* at 222 (Schoelen J., dissenting).

Mr. Henderson timely appealed to this court, and a panel heard oral argument on June 5, 2009. Recognizing that the case raised the question of whether *Bowles* requires or suggests that we overrule previous en banc holdings of our court, we granted rehearing en banc sua sponte on June 29, 2009. *Henderson v. Shinseki*, 327 Fed. Appx. 901, 2009 WL 1845590 (Fed. Cir. 2009). The single question posed to the en banc court is this:

> Does the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007), require or suggest that this court should overrule its decisions in *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc), and *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc), holding that 38 U.S.C. § 7266 is subject to equitable tolling?

Appendix A

DISCUSSION

I.

Under 38 U.S.C. § 7292(c), we have jurisdiction "to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof . . . and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." Pursuant to 38 U.S.C. § 7292(d)(1), we "decide all relevant questions of law, including interpreting constitutional and statutory provisions." However, absent a constitutional issue, we "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2). As we stated in *Bailey*, "[b]ecause our review of this decision involves a question of statutory interpretation—namely the ability of the [Veterans Court] to equitably toll a particular statutory time limit and thereby exercise jurisdiction over a late-filed notice of appeal—we have jurisdiction over this matter." 160 F.3d at 1362. The question of whether § 7266(a) is subject to equitable tolling is a question of law and is reviewed de novo. *See id.; see also* 38 U.S.C. § 7292(d)(2).

Appendix A

II.

A.

Before turning to the contentions of the parties and our analysis, we examine *Bailey*, *Jaquay*, and *Bowles*. In *Bailey*, veteran Harold Bailey sought service connection for a pulmonary disorder. After his claim was denied by the RO, Bailey appealed to the Board, which also denied his claim. *Bailey*, 160 F.3d at 1361. The Board mailed copies of its decision to Bailey and his representative on August 8, 1996. The Board's decision informed Bailey that, under 38 U.S.C. § 7266(a), he had 120 days to appeal to the Veterans Court by filing a notice of appeal with the court at its address in Washington, D.C. *Id.*

Bailey filed his Notice of Appeal with the Veterans Court on January 25, 1997, after the expiration of the 120-day period specified in § 7266(a). *Id.* at 1361-62. Eventually, the Veterans Court dismissed the appeal for lack of jurisdiction, stating that equitable tolling was not available "to provide any relief in the case of an untimely filed [Notice of Appeal]." *Id.* at 1362. After Bailey appealed, we took the case en banc to determine whether the 120-day time period set forth in § 7266(a) is subject to equitable tolling.

The en banc court held that the time period in § 7266(a) is subject to equitable tolling. In so doing, the court "t[ook its] guidance" from *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). *Bailey*, 160 F.3d at 1363. In that case, Shirley Irwin was fired from his job with the VA.

Subsequently, he sought to bring a Title VII claim in district court after exhausting his remedies within the agency and before the Equal Employment Opportunity Commission ("EEOC"). 498 U.S. at 90-91. Section 2000e-16(c) of Title 42 provided at the time, as a statute of limitations, that a Title VII complaint had to be filed "within thirty days of receipt of notice of final action" by the EEOC.[2] *Id.* at 94. Although Irwin did not file his complaint in a timely fashion, he argued that equitable tolling should apply and excuse his delay. *Id.* at 91.

After the district court dismissed Irwin's complaint and the Fifth Circuit affirmed the dismissal, the Supreme Court granted certiorari. Deciding the case, the Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95. The Court further held that equitable tolling should apply to 42 U.S.C. § 2000e-16(c), stating that the use of equitable tolling against the government did not improperly broaden Congress's statutory waiver of sovereign immunity.[3] *Id.* at 95-96.

In *Bailey*, we viewed § 7266(a) as a time of review provision, *see* 160 F.3d at 1365-66, but we declined to cabin *Irwin* to cases involving statutes of limitations. *Id.* We stated that the Supreme Court's opinion in *Irwin*

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2. In 1991, this time period was extended to ninety days. *See* Pub. L. No. 102-166, § 114(1), 105 Stat. 1071, 1079 (Nov. 21, 1991).

3. The Court, however, found equitable tolling was inappropriate in Irwin's case.

did not "distinguish among the various kinds of time limitations that may act as conditions to the waivers of sovereign immunity required to permit a cause of action to be pitched against the United States." *Id.* at 1364. We further stated that the rule we drew from *Irwin* was that "the doctrine of equitable tolling, when available in comparable suits of private parties, is available in suits against the United States, unless Congress has expressed its intent to the contrary." *Id.* We concluded that there was "no reason to believe" that Congress wanted to bar the application of equitable tolling to § 7266(a). *Id.* at 1368.

The *Bailey* Court distinguished *Stone v. Immigration & Naturalization Service*, 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995), and *Missouri v. Jenkins*, 495 U.S. 33, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990). In *Stone*, which involved a final deportation order of the Board of Immigration Appeals ("BIA"), the Supreme Court held that the time for filing a petition for review of the order with a circuit court of appeals was jurisdictional and thus could not be equitably tolled.[4] Although the *Stone* Court stated that "statutory provisions specifying the time of review" are "mandatory and jurisdictional," 514 U.S. at 405, we said in *Bailey*

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4. The text of 8 U.S.C. § 1105a(a)(1) (1994), the statute at issue in *Stone*, provided that "a petition for review [of a final deportation order] may be filed not later than 90 days after the date of the issuance of the final deportation order." The statute was repealed, effective April 1, 1997, by Pub. Law No. 104-208, Div. C, Title III, § 306(b), 110 Stat. 3009-612 (Sept. 30, 1996).

that we did not think this language could "be read to mean that statutes specifying the time of review cannot be subject to equitable tolling because such statutes are mandatory and jurisdictional." *Bailey*, 160 F.3d at 1366. Rather, we said that we thought it reasonable to read this language to mean that "statutory provisions specifying the time for review are not subject to equitable tolling, after *Irwin*, if Congress has so expressed its intent." *Id.*

In *Missouri v. Jenkins*, the Supreme Court held that the ninety-day time limit for filing a petition for certiorari in a civil action, set forth in 28 U.S.C. § 2101(c), is not subject to equitable tolling.[5] 495 U.S. at 45. We stated in *Bailey* that we read *Missouri v. Jenkins* in light of *Irwin* to mean that time of review statutes cannot be equitably tolled where Congress has provided contrary intent. *Bailey*, 160 F.3d at 1367. We found that such intent was present in the case of § 2101(c) because Congress had added a sixty-day good cause exception to the ninety-day time limit in the statute. *Id.* Because Congress specifically included a good cause exception,

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5. Section 2101(c) of Title 28 provides:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

we stated that Congress "expressed an intent to shield the statute from equitable tolling," and thus *Missouri v. Jenkins* and *Irwin* could be harmonized. *Id.* We concluded our discussion of *Stone* and *Missouri v. Jenkins* by stating: "We recognize that language in *Stone* and *Missouri v. Jenkins* can be read to draw a bright line which would place statutes of limitation on one side of the *Irwin* presumption and statutes of timing of review on the other. We are not comfortable drawing that line . . . ." *Id.*

After analyzing § 7266(a), we concluded that the government had not rebutted the *Irwin* presumption, and that § 7266(a)'s time period was therefore subject to equitable tolling. In reaching this conclusion, we noted that Congress did not express contrary intent that would indicate equitable tolling should not apply. For example, in *United States v. Brockamp*, 519 U.S. 347, 350, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997), we observed, the Supreme Court held that the statute of limitations in 26 U.S.C. § 6511 is not subject to equitable tolling because it is "set[] forth . . . in a highly detailed technical manner, that linguistically speaking, cannot easily be read as containing implicit exceptions."[6] Further, § 6511 expressly states exceptions to its time limits, and "equitable tolling" is not one of the exceptions enumerated. *Id.* at 352. We observed in addition that, in *United States v. Beggerly*, 524 U.S. 38, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998), the Supreme Court found that

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6. Section 6511 of Title 26 deals with the procedures for filing tax-refund claims.

Congress had rebutted the presumption of equitable tolling for 28 U.S.C. § 2409a because the statute provides for an "unusually generous" statute of limitations that "d[oes] not begin to run until the plaintiff 'knew or should have known of the claim of the United States.'" [7] 524 U.S. at 48-49. We determined that, unlike the statutes in *Brockamp* and *Beggerly*, § 7266(a) is neither highly technical nor generous, and does not provide for explicit exceptions to the limitations period it contains. Thus, we concluded that the appeal period in § 7266(a) is subject to equitable tolling, overruling prior precedent to the contrary. *Bailey*, 160 F.3d at 1368. Accordingly, we reversed the decision of the Veterans Court and remanded the case for a determination as to whether Bailey was entitled to the benefit of equitable tolling.

In concurrence, now-Chief Judge Michel wrote separately "because certain statements of our court about certain comments in *Irwin* could be read to suggest a broader application of *Irwin* to other tribunals . . . ." *Bailey*, 160 F.3d at 1368 (Michel, J., concurring). The concurrence focused on the "unique, paternalistic administrative environment" of the Veterans Court, and noted that "disputes that arise in this system are subject to procedural and other rules that are distinctly advantageous to the veteran claimant." *Id.* at 1368-69. Because Judge Michel could find no possibility for "comparable suits of private

7. Section 2409a of Title 28 addresses procedures for bringing actions for quiet title where the United States is a party.

parties" in the veterans context, he reasoned that the holding in *Irwin* was inapplicable. *Id.* at 1370. The concurrence nonetheless concluded that equitable tolling of § 7266(a)'s 120-day period was appropriate because the "entire scheme is imbued with special beneficence from a grateful sovereign." *Id.* at 1370.

Dissenting, Judge Bryson pointed out that the Federal Circuit had "previously characterized compliance with the 120-day appeal period in 38 U.S.C. § 7266(a) as 'a prerequisite for jurisdiction in the [Veterans Court],'" and that consequently the court had held that the 120-day period was not subject to extension upon a showing of good cause. *Id.* According to the dissent, the question of whether § 7266(a) is subject to equitable tolling was controlled not by *Irwin*, but by *Stone*. *Id.* at 1372. The dissent drew the bright line the majority rejected, finding that while statutes of limitations are subject to the *Irwin* presumption of equitable tolling, "[p]eriods for filing notices of appeal are not normally regarded as statutes of limitations." *Id.* at 1371. "Instead, they are considered 'timing of review' provisions, which are typically deemed 'mandatory and jurisdictional' and not subject to equitable tolling." *Id.* at 1371-72. The statute in *Irwin*, the dissent stated, was a statute of limitations because it commenced a civil suit in district court, and was not an appeal from any court or other body. *Id.* at 1372.

By contrast, the dissent stated, the statute in *Stone* specified the time for review of a decision of the BIA by

a federal court of appeals. The dissent highlighted the following language from the Court's opinion in *Stone*, *id.*:

> Judicial review provisions . . . are jurisdictional in nature and must be construed with strict fidelity to their terms. . . . This is all the more true of statutory review provisions specifying the timing of review, for those time limits are, as we have often stated, "mandatory and jurisdictional," . . . and are not subject to equitable tolling.

Stone, 514 U.S. at 405. The dissent concluded that the appeal provision in *Stone*, 8 U.S.C. § 1105a(a)(1), paralleled § 7266(a), "in that both provide a fixed period of time within which an appeal may be taken to a reviewing court." *Bailey*, 160 F.3d at 1372. By contrast, the limitations period at issue in *Irwin* is not a provision for appellate review "because the action brought in district court is not a review of anything done by the EEOC, but an original discrimination action against the employer agency." Finally, the dissent reviewed the pertinent legislative history and determined that although it was "not conclusive," it too supported the conclusion that § 7266(a) is jurisdictional in nature and not subject to equitable tolling.

B.

In *Jaquay*, the en banc court addressed the question of whether a misfiled motion asking for Board reconsideration "equitably tolled the judicial appeal period for filing [a] notice of appeal to the Veterans Court." 304 F.3d at 1278. Veteran Oliver Jaquay attempted to file a motion for reconsideration of a final Board decision, but incorrectly filed it with his RO. After ten months had elapsed, the RO forwarded the motion to the Board, where it was denied. When Jaquay appealed the reconsideration decision to the Veterans Court (within 120 days of the denial), the Veterans Court granted the government's motion to dismiss because the notice of appeal was not filed within 120 days of the *initial* final Board decision. Further, the Veterans Court found tolling inappropriate under *Rosler v. Derwinski*, 1 Vet. App. 241, 249 (1991), where it had held that a motion for reconsideration filed with the Board within 120 days of the Board's final decision tolls the time required to file a notice of appeal with the Veterans Court until 120 days after the reconsideration decision. *Id.* We reversed, holding that Jaquay's misfiling equitably tolled the 120-day period for filing at the Veterans Court.

We noted that, in *Irwin*, the Supreme Court stated that equitable tolling is available (1) "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period," or (2) "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96. We also noted that the Supreme Court had previously found equitable tolling appropriate where a plaintiff had "filed the

correct complaint in the wrong court." *Jaquay*, 304 F.3d at 1285. We stated that, "[i]n the context of the non-adversarial, paternalistic, uniquely pro-claimant veterans' compensation system, and consistent with our decision in *Bailey*, the availability of equitable tolling pursuant to *Irwin* should be interpreted liberally with respect to filings during the non-adversarial stage of the veterans' benefits process." *Id.* at 1286. We thus held as a matter of law that "a veteran who seeks redress of a claim and misfiles his request at the same [RO] from which the claim originated" is entitled to equitable tolling under the first *Irwin* prong "despite the defective filing" because he has "actively pursued his judicial remedies." *Id.* at 1288-89.

C.

The Supreme Court decided *Bowles* in 2007, after *Bailey* and *Jaquay* were decided by this court. In *Bowles*, the Court sought to clarify the circumstances in which time limits have jurisdictional significance. In the case, Keith Bowles petitioned for *habeas corpus* relief from a murder conviction, after unsuccessfully challenging on direct appeal in state court both his conviction and sentence of fifteen years to life. 551 U.S. at 207. The district court in Ohio denied the petition, and Bowles failed to timely appeal. *Id.* Pursuant to 28 U.S.C. § 2107(c) and Federal Rule of Appellate Procedure 4(a)(6) ("Rule 4(a)(6)"), though, the district court exercised its right to extend the period for filing

a notice of appeal.[8] *Id.* However, the court's order

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8. Section 2107(c) of Title 28 provides:

> (c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—
>
> (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
>
> (2) that no party would be prejudiced,
>
> the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Rule 4(a)(6) similarly provides:

> **(6) Reopening the Time to File an Appeal**. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> **(A)** the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(Cont'd)

erroneously gave Bowles seventeen days to file the notice of appeal, instead of the fourteen days allowed by the statute and the rule. Bowles filed his notice of appeal on the sixteenth day. *Id.* Before the United States Court of Appeals for the Sixth Circuit, Russell, the Warden who had custody of Bowles, argued that Bowles's notice of appeal was untimely and that the court therefore lacked jurisdiction to hear the case. The Sixth Circuit agreed and dismissed the appeal. *Bowles v. Russell*, 432 F.3d 668, 677 (6th Cir. 2005). Noting that Rule 4(a) had been interpreted as "both mandatory and jurisdictional" by the Supreme Court and the Sixth Circuit, *id.* at 673, the court held that the Rule was "not susceptible to extension through mistake, courtesy, or grace." *Id.* at 669.

The Supreme Court affirmed the decision of the Sixth Circuit. Focusing on 28 U.S.C. § 2107(c), the Court held that the statute was more than a "claim processing rule," *Bowles*, 551 U.S. at 213, and stated repeatedly that time limits for filing a notice of appeal are jurisdictional in nature. *Id.* at 206, 210-212. The Court stressed the fact that it had "long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Id.* at 209. In addition, the Court

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(Cont'd)

> **(B)** the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
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> **(C)** the court finds that no party would be prejudiced.

emphasized that there is particular "jurisdictional significance" when the time limit is set forth statutorily, rather than through court-promulgated rules. *Id.* at 210-11. In that regard, the Court contrasted its treatment of Federal Rule of Bankruptcy Procedure 4004 ("Rule 4004"), which governs the filing deadline for a complaint objecting to a debtor's discharge, with 28 U.S.C. § 2101(c), which governs the filing deadline for a writ of certiorari in civil cases. In discussing Rule 4004, the Court recounted its decision in *Kontrick v. Ryan*, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004). In *Kontrick*, the Court held that Rule 4004 was not jurisdictional. According to the *Bowles* Court, "[c]ritical to [the] analysis [in *Kontrick*] was the fact that 'no statute . . . specifies a time limit for filing a complaint objecting to the debtor's discharge.'" 551 U.S. at 211 (quoting *Kontrick*, 540 U.S. at 448). As only Congress can determine the jurisdiction of a lower federal court, the Court found it inappropriate to label rules such as Rule 4004 "jurisdictional." By contrast, referring to 28 U.S.C. § 2101(c), the Court stated: "We have repeatedly held that this statute-based filing period for civil cases is jurisdictional." *Bowles*, 551 U.S. at 212.

Continuing, the Court opined that "[j]urisdictional treatment of statutory time limits makes good sense." *Id.* at 212. "Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Id.* at 212-13. Because Congress specifically

provided a limit on the number of days a court may extend the period in which to file a notice of appeal in 28 U.S.C. § 2107(c), the Court found that limit to be "more than a simple 'claim-processing rule,'" and thus jurisdictional. *Id.* at 213. The Court stated: "Bowles' failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations." *Id.* In conclusion, the Court emphasized: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Id.* at 214. The Court added that it had "no authority to create equitable exceptions to jurisdictional requirements." *Id.* The Court thus affirmed the dismissal of Bowles's habeas appeal. *Id.* at 214-15.

III.

On appeal, Mr. Henderson, supported by various amici, makes several arguments as to why *Bowles* does not require us to overrule *Bailey* and *Jaquay*.[9] He first contends that 38 U.S.C. § 7266(a) is analogous to a statute of limitations rather than a jurisdictional time

9. We received amicus curiae briefs from veteran Allan G. Halseth; Disabled American Veterans ("DAM"); National Organization of Veterans' Advocates, Inc. ("NOVA"); Paralyzed Veterans of America and the Jewish War Veterans of the United States of America ("PV/JWV"); and United Spinal Association ("United Spinal"), all urging reversal of the decision of the Veterans Court.

of review provision. Starting from that premise, he argues that the question of whether the 120-day filing period in § 7266(a) is subject to equitable tolling is governed by *Irwin*. Mr. Henderson urges that, in any event, the *Bowles* analysis should be limited to appeals in Article III courts, and should not be extended to cover appeals to the Article I Veterans Court. Finally, Mr. Henderson points to the unique pro-claimant, non-adversarial nature of proceedings before the RO and the Board. According to Mr. Henderson, the unique nature of veterans proceedings supports a reading of § 7266(a) that allows for equitable tolling.

In arguing that § 7266(a) is analogous to a statute of limitations, rather than a time of review provision, and that *Irwin* therefore controls, Mr. Henderson points to *Jaquay*. There, we stated that "the filing of a notice of appeal at the Veterans Court, like the filing of a complaint in a trial court, is the first action taken by a veteran in a court of law." 304 F.3d at 1286. He also points to the statement in *Jaquay* that *Bailey* decided "whether the 120-day *statute of limitations* under 38 U.S.C. § 7266 was subject to the doctrine of equitable tolling." Appellant's Br. 19 (quoting *Jaquay*, 304 F.3d at 1283). According to Mr. Henderson, "[t]he rationale for these statements is simple: when a veteran files [a Notice of Appeal] in the Veterans Court, the veteran is *commencing* litigation against the United States, *not* pursuing an appeal from one Article III court to another." *Id.*

Mr. Henderson argues that the title of § 7266(a), "Notice of Appeal," does not change the fact that the statute constitutes a statute of limitations. Mr. Henderson reasons that although a case has been through several non-adversarial administrative proceedings when it reaches the Veterans Court, it has not yet been heard in a court of law. By contrast, an appeal from a district court to a circuit court of appeals already has been heard in one Article III court. *See Bowles*, 551 US at 208-09 (discussing the time limit for seeking review of an Article Ill court's decision in another Article III court). In other words, Mr. Henderson contends that § 7266(a) must be a statute of limitations because he "has not had a chance to engage the judicial machinery" before the time of his appeal to the Veterans Court. *See* En Banc Oral Arg., 14:19-14:22, Sept. 18, 2009.

According to Mr. Henderson, because § 7266(a) is analogous to a statute of limitations provision, the *Irwin* presumption in favor of equitable tolling applies. In that regard, he argues that, as we determined in *Bailey*, there is no evidence of congressional intent to foreclose the application of equitable tolling to § 7266(a). Mr. Henderson posits that where Congress has written in exceptions to a time period set forth in a statute, as it did in 28 U.S.C. § 2107(c), then the specified time period cannot be equitably tolled. However, in the case of § 7266(a), no such exception was written in. Thus, Mr. Henderson contends that "equitable tolling is presumed to exist in the statute." *Id*. at 6:04-08. Relatedly, Mr. Henderson urges that the intent to provide for equitable tolling has been solidified in the past eleven years. In

the period since *Bailey*, Congress has amended § 7266(a), and chosen not to specify that equitable tolling is unavailable, indicating to Mr. Henderson that Congress has acquiesced in the interpretation we gave the statute in *Bailey*.[10] Appellant's Reply Br. 9-10.

The government responds that 38 U.S.C. § 7266(a) constitutes a mandatory and jurisdictional time of review provision. It frames the issue by stating that "[a] statute governing the timing of an appeal is jurisdictional because it identifies the point at which the subject-matter jurisdiction of the lower court or tribunal ends and that of the appellate court begins." Appellee's Br. 11; *see also Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982) (per curiam) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

The government argues that, in view of *Bowles*, there can be no doubt that § 7266(a) is jurisdictional. The government notes that, in *Bowles*, the Supreme Court stressed the fact that statutes specifying the time for taking an appeal in civil cases are jurisdictional. The government further notes that both this court and the

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10. In 2001, Congress amended § 7266 as part of a broad package modifying the veterans' benefits system. *See* Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, § 507, 115 Stat. 976, 997.

Supreme Court have referred to proceedings in the Veterans Court as civil actions. *See Scarborough v. Principi*, 541 U.S. 401, 413, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004); *Abbs v. Principi*, 237 F.3d 1342, 1348 (Fed. Cir. 2001). Additionally, the government points out, § 7266(a) refers to the filing in the Veterans Court as a "notice of appeal," indicating that the Veterans Court does not commence litigation, but rather continues litigation first brought before the Board. The government also points out that the Veterans Court cannot review fact findings de novo, 38 U.S.C. § 7261(c), and must apply the doctrine of harmless error. *See Shinseki v. Sanders*, 129 S. Ct. 1696, 1704, 173 L. Ed. 2d 532 (2009) (holding that 38 U.S.C. § 7261(b)(2) requires the Veterans Court to apply the same kind of "harmless-error" rule that courts ordinarily apply in civil cases). In addition, the Veterans Court reviews each case that comes before it on a record that is limited to the record developed before the RO and the Board. 38 U.S.C. § 7252(a). The government argues that these requirements are characteristic of appellate courts, not courts or bodies where litigation is commenced, and that therefore it is inappropriate "to treat a veteran's appeal . . . like an 'initial' claim." Appellee's Br. 25. The government also argues that the legislative history does not support equitable tolling.

IV.

In *Bowles*, the Supreme Court "ma[d]e clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles*, 551 U.S. at 214. The Court also made it clear that courts "ha[ve] no authority to create exceptions to jurisdictional requirements." *Id.* at 214. Only Congress may do that. *Id.* at 212-13. ("Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."). We hold today that 38 U.S.C. § 7266(a) is a notice of appeal, or time of review, provision in a civil case. In line with *Bowles*, we further hold that because § 7266(a) is a time of review provision, it is jurisdictional and that because Congress has not so provided, the statute is not subject to equitable tolling.

A.

Preliminarily, we recognize that, as Mr. Henderson points out, we stated in *Jaquay* that "the filing of a notice of appeal at the Veterans Court, like the filing of a complaint in a trial court, is the first action taken by a veteran in a court of law." 304 F.3d at 1286. As he further points out, we also stated in *Jaquay* that *Bailey* decided "whether the 120-day *statute of limitations* under 38 U.S.C. § 7266 was subject to equitable tolling." *Id.* at 1283 (emphasis added). These statements do not alter our conclusion that § 7266(a) is a time of review provision.

We agree that Mr. Henderson's appeal to the Veterans Court represented the first time he could appear before a court. However, that was also the case for the litigant in *Stone*. Although Stone appeared solely within the executive system (namely, the BIA) before his petition to the circuit court of appeals, the Supreme Court still held that 8 U.S.C. § 1105a(a)(1) was mandatory and jurisdictional. Therefore, the fact that the Veterans Court is the first opportunity for a veteran to appear before a judicial body does not make § 7266(a) a statute of limitations rather than a time of review provision. More importantly, the statutory scheme convinces us that § 7266(a) is indeed a time of review provision.

Turning to the nature of proceedings in the Veterans Court, we begin by noting that both the Supreme Court and this court have labeled actions in the Veterans Court "civil actions." *See Sanders*, 129 S. Ct. at 1700 ("In these two civil cases, the Department of Veterans Affairs (VA) denied veterans' claims for disability benefits."); *Scarborough v. Principi*, 541 U.S. 401, 413, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004) (labeling veterans actions "civil actions" for purposes of fees allowed by the Equal Access to Justice Act); *Abbs v. Principi*, 237 F.3d 1342, 1348 (Fed. Cir. 2001) (same). We hold that an appeal in the Veterans Court is a "civil case." *See Bowles*, 551 U.S. at 214.

We also hold that, because it speaks to "the timely filing of a notice of appeal," *id.*, § 7266(a) is a time of review provision. First, the statute is titled "Notice of

Appeal," and it states that a veteran "*shall* file a *notice of appeal*" "in order to obtain *review*" by the Veterans Court. 38 U.S.C. § 7266(a). This language plainly suggests that § 7266(a) is a time of review provision. Beyond that, § 7252(a) of Title 38 states that the Veterans Court "*review[s]* decisions of the Board of Veterans' Appeals," while § 7252(b) provides that a decision of the Veterans Court "shall be on the record of proceedings before the Secretary and the Board." Additionally, the Veterans Court reviews the fact findings of the Board under a clearly erroneous standard, 38 U.S.C. § 7261(b), and must consider the rule of prejudicial error, 38 U.S.C. § 7261(b)(2). These are characteristics of appellate review, rather than of an assessment of claims in the first instance. *See*, *e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 464, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988) (noting that it is among "the most basic principles of appellate review" that an appellate court not disturb findings of fact unless they are clearly in error) (citing Fed. R. Civ. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous")); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969) ("appellate courts must constantly have in mind that their function is not to decide factual issues de novo."). As the Veterans Court stated in *Frankel v. Derwinski*, 1 Vet. App. 23, 25 (1990), "the primary purpose for creating the [Veterans Court] was to provide judicial *review* of [Board] decisions." The very fact that the Veterans Court can only affirm, reverse, modify, and remand decisions of the Board indicates that it is an appellate body, not a court where claims are

commenced. *See* 38 U.S.C. § 7252(a). In contrast, a Title VII claim (like the one brought in *Irwin*) is a new civil action. While the district court will certainly consider many of the same facts and the same underlying conduct as the agency and the EEOC, the district court is free to make de novo fact findings and reach its own conclusions, unconstrained by the agency or EEOC record or conclusions. *See*, *e.g.*, *Chandler v. Roudebush*, 425 U.S. 840, 863, 96 S. Ct. 1949, 48 L. Ed. 2d 416 (1976) (in a "civil action" under Title VII, the district court considers the discrimination claim de novo). For the foregoing reasons, we hold that 38 U.S.C. § 7266(a) is a time of review provision. We therefore must reject Mr. Henderson's contention that § 7266(a) is analogous to a statute of limitations.

In holding that § 7266(a) is a time of review provision, we do not break new ground. Indeed, the *Bailey* court recognized the statute as such. The court referred to § 7266(a) as being "specific in stating where, how and when the notice of appeal must be filed." 160 F.3d at 1365. In addition, in addressing *Stone's* statement that "statutory review provisions specifying the time of review" are "mandatory and jurisdictional," *Stone*, 514 U.S. at 405, this court stated: "We do not think this language can be read to mean that statutes specifying the time for review cannot be subject to equitable tolling because such statutes are mandatory and jurisdictional." *Bailey*, 160 F.3d at 1366. It would not have been necessary for the court to make this latter statement if it had not thought that § 7266(a) was a time of review provision.

B.

Holding that 38 U.S.C. § 7266(a) is a time of review provision in a civil case does not end the inquiry, however. As the dissent in *Bailey* stated, the "general principle in *Stone* regarding timing-of-review provisions would be inapplicable if there were anything in § 7266(a)(1) or its legislative history indicating that the timing provision governing appeals to the [Veterans Court] was meant to be subject to equitable tolling." *Bailey*, 160 F.3d at 1372.

Beginning with § 7266(a) itself, we see nothing on its face to indicate that it is meant to be subject to equitable tolling. The statutory language is clear and unequivocal, with no suggestion of equitable tolling:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

38 U.S.C. § 7266(a).

At the same time, looking beyond the language of the statute, we cannot glean clear intent on the part of Congress to override the presumed jurisdictional treatment of time of review provisions. *See Bread*

Political Action Comm. v. Fed. Election Comm'n, 455 U.S. 577, 585, 102 S. Ct. 1235, 71 L. Ed. 2d 432 (1982) (noting appellants' burden to show "'clear expression' or 'clear evidence' of congressional intent" to go beyond a statutory provision and make additional procedures available to plaintiffs). We begin with the legislative history of the Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), the statute that created the Veterans Court. In the Senate version of the bill, the regional circuits directly reviewed decisions of the Board, and the time of review provision was jurisdictional. *Bailey*, 160 F.3d at 1372 (citing S. 11, 100th Cong., 2d Sess. § 4025(g)(1) and S. Rep. No. 100-418 (1988), and noting that "[t]he bill provided that '[n]o action for judicial review may be brought' unless the request for review was filed within 180 days of the [Board] decision"). In the House version of the bill, the Board was replaced by "a 65-judge court responsible for reviewing decisions of the Department's regional offices." 160 F.3d at 1372 (citing H.R. 5288, 100th Cong., 2d Sess. § 4015(d)(1)). In the House bill, appeals had to be filed with the designated court within ninety days of the RO decision, but that period could be extended for good cause. 160 F.3d at 1373. Both the 180-day language in the Senate bill and the "good cause" provision in the House bill were omitted from the compromise bill that resulted in the final legislation. The *Bailey* dissent noted that, had the good cause provision remained in the final legislation, the timing statute would "have been properly construed as non-jurisdictional in nature." *Id.* Because the final bill did not retain the good-cause exception, the dissent stated that the compromise bill suggested § 7266(a) was jurisdictional in nature. *Id.* We agree.

Congress amended § 7266 in 1994. *See* Veterans' Benefits Improvements Act of 1994, Pub. L. No., 103-446, § 511(a), 108 Stat. 4645, 4670 (1994). The amendment did not affect the jurisdictional nature of the timing requirement, however. *Bailey*, 160 F.3d at 1373. The 1994 amendment simply altered the requirement of actual delivery of a notice of appeal to the Veterans Court within 120 days, by providing that notices of appeal would be deemed timely if they were mailed within the 120-day appeal period. *See id.*; 38 U.S.C. § 7266(b), (c). The Bailey dissent determined that "[t]he 1994 amendment thus made the timely filing requirement more lenient by establishing a 'postmark rule,' but it did not alter the jurisdictional nature of that requirement." 160 F.3d at 1373. Again, we agree.

As noted above, Mr. Henderson has observed that eleven years have passed since *Bailey*, and he argues that Congress has thus acquiesced in our reading of § 7266(a) in *Bailey*. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978). It is true that in the period since 1998, Congress has not amended § 7266(a) in a way that would disturb *Bailey*. *See supra* note 10. We are not prepared to conclude, however, that this congressional inactivity represents clear intent to rebut the jurisdictional treatment of § 7266(a), as urged by Mr. Henderson. The "re-enactment rule" delineated in *Lorillard* does not establish congressional acquiescence in all situations.

See, *e.g.*, *Coke v. Long Island Care At Home, Ltd.*, 376 F.3d 118, 130 n.5 (2d Cir. 2004) (discussing the limitations on the congressional acquiescence argument, "affectionately known as the 'dog didn't bark canon'"), *vacated and remanded on other grounds*, 546 U.S. 1147, 126 S. Ct. 1189, 163 L. Ed. 2d 1125 (2006). Here, it would be inappropriate to rely on congressional "silence" to find approval of Mr. Henderson's position, i.e., that Congress has acquiesced in the interpretation we gave the statute in *Bailey*, when the Supreme Court itself has characterized its precedent as having "*long and repeatedly held* that the time limits for filing a notice of appeal are jurisdictional in nature." *Bowles*, 551 U.S. at 206 (emphasis added). We agree with the government that, in this instance, it is more appropriate to presume that Congress intended application of "long and repeated[]" and "consistent[]" Supreme Court precedent rather than to presume that Congress *sub silentio* intended the statutory appeal period at issue to be nonjurisdictional. We hold that because § 7266(a) is a time of review provision in a civil case and because Congress has not so provided, it is not subject to equitable tolling. It is thus mandatory and jurisdictional.

Though recognizing § 7266(a) as a time of review provision, the *Bailey* court held that it was subject to equitable tolling. It reached this conclusion because it determined that *Irwin* was controlling. As seen, this holding was based upon two determinations. First, the court concluded that *Irwin* "d[id] not distinguish among the various kinds of limitations that may act as conditions to the waivers of sovereign immunity required

to permit a cause of action to be pitched against the United States." *Id.* at 1364. Second, and most importantly, the court rejected the proposition that *Irwin* had been limited by *Stone*. Examining *Stone*, the court concluded that its language that statutory time of review provisions are "mandatory and jurisdictional" meant only that such provisions "are not subject to equitable tolling after *Irwin* if Congress has so expressed its intent." *Id.* at 1366. The *Bailey* court concluded by stating that it was "not comfortable" drawing "a bright line which would place statutes of limitation on one side of the *Irwin* presumption [in favor of equitable tolling] and statutes of timing of review on the other." *Id.* at 1367.

Bailey's holding that § 7266(a) is subject to equitable tolling has been undermined by *Bowles*, however. As seen, in *Bowles*, the Supreme Court stated: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles*, 551 U.S. at 214. And of particular significance for this case, the Court further stated that because Bowles's error in filing his appeal late was "one of jurisdictional magnitude, he [could] not rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations." *Id.* at 213. The Court added that it had no authority to create equitable exceptions to jurisdictional requirements. *Id.* at 214. The critical point is that, whereas in *Bailey* we relied on *Irwin* to conclude that time of review provisions are subject to equitable tolling unless Congress has expressed a contrary intent, *see* 160 F.3d at 1365-66, in *Bowles* the Court reached

the conclusion that because time of review provisions are mandatory and jurisdictional, they *are not* subject to equitable tolling unless Congress so provides, *see* 551 U.S. at 212-13. Thus, in light of *Bowles*, we are compelled to draw the bright line between statutes of limitations and time of review provisions that the *Bailey* court declined to draw. Because Congress has not expressed the requisite assent, we hold that the time of review period in § 7266(a) is not subject to equitable tolling.

C.

Faced with *Bowles*, Mr. Henderson contends that the reach of the Court's decision is limited. First, he argues that, in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008), the Supreme Court had the opportunity to expand its holding in *Bowles*, but chose not to do so. Appellant's Br. 15. He states that one issue in *John R. Sand & Gravel* was whether 28 U.S.C. § 2501, the six-year statute of limitations applicable to Tucker Act suits in the United States Court of Federal Claims, is subject to equitable tolling. According to Mr. Henderson, the Court held that § 2501 is "jurisdictional," citing *Bowles* to support its definition of a "jurisdictional" statute. "But," Mr. Henderson continues, "the Supreme Court did not expand *Bowles* by holding that because the statute is jurisdictional, it is not subject to equitable tolling." *Id.* The government rejoins that *John R. Sand & Gravel* does not help Mr. Henderson.

We are not persuaded by Mr. Henderson's argument that *John R. Sand & Gravel* suggests that *Bowles* is limited. The issue in *John R. Sand & Gravel* was narrow. The Supreme Court stated: "The question presented is whether a court must raise on its own the timeliness of a lawsuit filed in the Court of Federal Claims, despite the Government's waiver of the issue." 552 U.S. at 132. The Court held that 28 U.S.C. § 2501, which it characterized as "the special statute of limitations governing the Court of Federal Claims," required "that *sua sponte* consideration." *Id.* The Court affirmed the decision of this court to consider the timeliness of John R. Sand & Gravel's suit in the Court of Federal Claims even though the government had waived the issue. *Id.* at 139; *see John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345 (Fed. Cir. 2006).

It is true that, in deciding *John R. Sand & Gravel*, the Court mentioned *Bowles* in passing in referring to "jurisdictional" statutes. *See John R. Sand & Gravel*, 552 U.S. at 134 ("As convenient shorthand, the Court has sometimes referred to the time limits in [statutes of limitations] as 'jurisdictional.' *See*, *e.g.*, *Bowles*, *supra*, at 2364.") However, contrary to Mr. Henderson's argument, because *John R. Sand & Gravel* involved the issue of waiver and a statute of limitations provision, rather than the issue of equitable tolling and a time of review provision, which was at issue in *Bowles*, there was no need for the *John R. Sand & Gravel* Court to discuss *Bowles* further one way or the other. Thus, not surprisingly, the Court focused its attention on *Irwin*, which, as a statute of limitations case, was pertinent to

the issue before it. In short, we do not see *John R. Sand & Gravel* as being helpful to Mr. Henderson.

Mr. Henderson makes a second argument to limit *Bowles*. He contends that the Court's decision in *Bowles*, which did not discuss § 7266(a) or the doctrine of equitable tolling, Appellant's Br. 13-14, "relies on separation of powers principles that apply to Article III courts." *Id.* at 22. Mr. Henderson states that *Bowles* "is consistent with the fundamental principle that Article III courts cannot 'extend by rule the judicial power of the United States described in Article III of the Constitution.'" *Id.* at 23 (quoting *Willy v. Coastal Corp.*, 503 U.S. 131, 135, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992)). Mr. Henderson urges that this principle does not apply to Article I tribunals such as the Veterans Court: "The Supreme Court in *Bowles* was not faced with, and did not reach, the question of whether statutory time limits applicable to Article I courts may be extended on equitable grounds," he states. *Id.*

The government urges that the Article I nature of the Veterans Court should not change our analysis. The government notes that the Supreme Court and circuit courts of appeals have held that time limits on appeals from agency orders and adjudications can be jurisdictional. *See Stone*, 514 U.S. at 406; *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 118 (2d Cir. 2008) (applying *Bowles*); *Cellular Telecomm's. & Internet Ass'n v. FCC*, 330 F.3d 502, 508, 356 U.S. App. D.C. 238 (D.C. Cir. 2003); *Florilli Corp. v. Pena*, 118 F.3d 1212, 1214 (8th Cir. 1997); *AFL-CIO v. OSHA*, 905 F.2d 1568, 1570, 284 U.S. App.

D.C. 401 (D.C. Cir. 1990); *Shendock v. Dir. Office Workers' Comp. Programs*, 893 F.2d 1458, 1462-66 (3d Cir. 1990). According to the government, here, as in *Griggs v. Provident Consumer Discount Co.*, the notice of appeal divests jurisdiction from one body and vests jurisdiction in another.[11] The government argues that this jurisdictional transfer occurs regardless of whether the bodies involved were created under Article I or Article III.

The Supreme Court has recently said: "[I]t is for Congress to determine the subject-matter jurisdiction of federal courts. This rule applies with *added* force to Article I tribunals, . . . which owe their existence to Congress' authority to enact legislation pursuant to Art. 1, § 8 of the Constitution." *United States v. Denedo*, 129 S. Ct. 2213, 2221, 173 L. Ed. 2d 1235 (2009) (citing *Bowles*) (internal citations and quotation marks omitted) (emphasis added). Additionally, as stated in *Bowles*, "the notion of subject-matter jurisdiction obviously extends to classes of cases . . . falling within a court's adjudicatory authority, but it is no less jurisdictional when Congress forbids federal courts from adjudicating an otherwise legitimate class of cases after a certain period has elapsed from final judgment." 551 U.S. at 213 (internal

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11. In *Griggs*, the Supreme Court reversed the Third Circuit's acceptance of jurisdiction pursuant to a premature filing of a notice of appeal. 459 U.S. at 58. In so doing, the Court stated: "The filing of a notice of appeal *is an event of jurisdictional significance*—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Id.* (emphasis added).

citations and quotation marks omitted) (omission in original). As a result, "when an appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." *Id.* (internal quotation marks omitted). Because the Supreme Court has stated that the jurisdictional rationale applies with even "*added*" force to Article I courts, we cannot agree with Mr. Henderson that the Article I nature of the Veterans Court changes the analysis under *Bowles*.

D.

For their part, the amici contend that while 28 U.S.C. § 2107(c), which was at issue in *Bowles*, is written in language limiting the Article III jurisdiction of the federal appellate courts, § 7266(a) is written as a "claim processing" rule, and therefore should be treated as non-jurisdictional. The amici note that subsection (c) of § 2107 provides that the "district court" can "extend the time for appeal" in certain instances. *See*, *e.g.*, Halseth Br. 22; NOVA Br. 8. They argue that this language defines the limits of what the district court can and cannot do, and therefore must be jurisdictional. By contrast, amici urge, § 7266(a) defines what the *veteran* must do, and the statute is therefore a claim processing rule, and not jurisdictional. Specifically, as seen, § 7266(a) provides that "a person adversely affected" by a decision of the Board "shall file a notice of appeal with the [Veterans Court] within 120 days after the date on which notice of the decision is mailed." Because the statute does not facially indicate which

cases the Veterans Court can and cannot take, amici argue that § 7266(a) does not contain any jurisdictional limitations. *See*, *e.g.*, Halseth Br. 13, 23; DAM Br. 6-7; PV/JWV Br. 4.

We reject the argument that § 7266(a) is subject to equitable tolling because it is a claim processing rule. As stated by the Supreme Court in *Bowles*, claim-processing rules "adopted by [a c]ourt for the orderly transaction of its business" are not jurisdictional (and indeed, cannot be, as only Congress can dictate the jurisdiction of the lower Article III courts). 551 U.S. at 211. At the same time, the Court has stressed "the jurisdictional significance of the fact that a time limitation is set forth in a *statute*," as opposed to in a court-promulgated rule. Id. at 210. As an initial matter, it is clear that § 7266(a) is not a "court-promulgated rule[]," but is a time limit enacted by Congress. It thus could properly be deemed "jurisdictional" under *Bowles*.

We recognize that while 28 U.S.C. § 2107, the statute at issue in *Bowles*, is phrased in terms of what the district court can and may do, § 7266(a) is phrased in terms of the actions a veteran must take to preserve his or her right to appeal. We conclude, however, that this distinction does not convert § 7266(a) into a claim-processing rule. The time limit is set out statutorily, a crucial point for the Supreme Court in determining which of such limits are jurisdictional and which are not. *See Bowles*, 551 U.S. at 211 (noting that § 2107 contains "the type of statutory time constraints that would limit a court's jurisdiction.") Moreover, although the statute

at issue here is drafted in terms of the veteran's obligations, it states that the notice of appeal "*shall*" be filed with the Veterans Court within 120 days of the mailing of the Board's final decision. 38 U.S.C. § 7266(a) (emphasis added). Furthermore, as we stated in Bailey, we must read the jurisdictional waiver of sovereign immunity for the Veterans Court, set forth in 38 U.S.C. § 7252, in light of the qualifications in § 7266, "because we must construe jurisdictional statutes narrowly and 'with precision and with fidelity to the terms by which Congress has expressed its wishes.'" *Bailey*, 160 F.3d at 1363. Section 7266(a) is the only provision that specifies the timing for filing a notice of appeal in the Veterans Court. The textual focus on the veteran does not transform the statute into a claim-processing rule.

V.

The final argument Mr. Henderson and the various amici make is that because the veterans system is uniquely non-adversarial and pro-claimant, we should not import jurisdictional rules into the system. The amici note that the Veterans Court was created to be an extra safeguard for those who served in the military, and that Congress strove to ensure, at the court's inception, that it was "[a]ccurate, informal, efficient, and fair." H.R. Rep. No. 100-936 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5808. The amici urge that only a flexible system, which allows for equitable tolling, can meet these four goals. *See*, *e.g.*, United Spinal Br. 4.

The government responds that we have stated that proceedings before the Veterans Court are not non-adversarial, and that there are certain legal requirements veterans must meet. *See Forshey v. Principi*, 284 F.3d 1335, 1355 (Fed. Cir. 2002), *superseded by statute on other grounds* ("The veterans' benefits system remains a non-adversarial system when cases are pending before the Veterans' Administration. However, the [Veterans Court's] proceedings are not non-adversarial."); *Bailey*, 160 F.3d at 1365 ("[V]eterans like Bailey must satisfy formal legal requirements, often without the benefit of legal counsel, before they are entitled to administrative and judicial review."). Although recognizing that special protections are afforded the veteran, the government argues that the meaning of § 7266(a) is clear, and we may not ignore the fact that the statute is a time of review provision.

As far as the uniquely pro-claimant, non-adversarial nature of the veterans system is concerned, we acknowledge that the government has special duties to assist a veteran with his or her claim. However, we have recently been reminded by the Supreme Court that, although "Congress has expressed special solicitude for the veterans' cause," we do not have free rein to establish special procedural schemes governing the veterans' system alone. *Shinseki v. Sanders*, 129 S. Ct. at 1707. In *Sanders*, the Supreme Court struck down our unique harmless error rubric, concluding that it was "too complex and rigid," and "impose[d] unreasonable evidentiary burdens upon the VA." *Id.* at 1700. In reaching this conclusion, the Court traced

the parallel language of the Administrative Procedure Act and the Veterans Court's harmless error statutes. The Supreme Court found "no indication of any relevant distinction between the manner in which reviewing courts treat civil and administrative" cases, and concluded that we must apply the harmless error framework set forth for "ordinary civil cases." *Id.* at 1704.

We complete our analysis with *Sanders* in mind. While it is clear the veterans' system is unique, we must be wary of hinging different procedural frameworks solely on the special nature of that system. Jurisdiction is in the province of Congress, and without any clear intent by Congress to provide for equitable relief from the Notice of Appeal filing deadline in 38 U.S.C. § 7266(a), we cannot read in such relief based on the nature of the veterans system.

CONCLUSION

We hold that 38 U.S.C. § 7266(a) is a time of review provision in a civil case and that, because Congress has not so provided, it is not subject to equitable tolling. The statute is thus mandatory and jurisdictional. We therefore overrule our decisions in *Bailey* and *Jaquay*, where we held that § 7266(a) is subject to equitable tolling. We overrule *Bailey* and *Jaquay* not because we have concluded in retrospect that they were incorrectly decided in light of then-current Supreme Court authority. Rather, we do so because we have concluded that they have been overtaken by subsequent authority, specifically, *Bowles*, where the Supreme Court

unequivocally stated that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement" and that it had "no authority to create equitable exceptions to jurisdictional requirements." 551 U.S. at 214. If Congress determines that the 120-day period for appealing to the Veterans Court from a decision of the Board should be subject to equitable tolling, it may amend § 7266(a) to compel a result different from the one we reach today. We, however, are not empowered to make that change. *See id.* at 215. For the foregoing reasons, the Veterans Court correctly held that it lacked jurisdiction to consider Mr. Henderson's appeal. Its decision dismissing his appeal is therefore affirmed.[12]

AFFIRMED

COSTS

No costs.

12. The court is grateful to Thomas W. Stoever, Jr. and Jacek A. Wypych of Arnold & Porter LLP for their excellent pro bono representation of Mr. Henderson.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2009-7006

DAVID L. HENDERSON,

Claimant-Appellant,

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs,

Respondent-Appellee.

Appeal from the United States Court of Appeals
for Veterans Claims in 05-0090,
Chief Judge William P. Greene, Jr.

DYK , *Circuit Judge*, with whom GAJARSA and MOORE, *Circuit Judges*, join, concurring.

I join the opinion of the Court, but I also agree with Judge Mayer that the rigid deadline of the existing statute can and does lead to unfairness. This is particularly so in the many cases where the veteran is not represented by counsel during the processing of the claim at the Veterans Administration and/or is suffering from a mental disability. These circumstances can make it extremely difficult for the veteran to navigate the system and meet the statutory deadline. These situations are not merely hypothetical, as our prior

decisions demonstrate.[1] In this case, the veteran suffered from a service-connected mental illness allegedly leading to the late filing. The problems with the rigid rule of the existing statute may suggest that Congress should amend the statute to provide a good cause exception.

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1. *See Barrett v. Nicholson*, 466 F.3d 1038 (Fed. Cir. 2006) (service-connected mental illness); *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc) (claimant's non-attorney representative mistakenly mailed request for reconsideration to wrong office, thus resulting in untimely filing); *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc) (no counsel; regional office mistakenly retained appeals documentation, thus resulting in untimely filing).

MAYER, *Circuit Judge*, with whom MICHEL, *Chief Judge*, and NEWMAN , *Circuit Judge*, join, dissenting.

"Courts do not normally overturn a long line of earlier cases without mentioning the matter." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008) ("*Sand & Gravel*"). *Bowles v. Russell*, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007), did not mention—much less overrule—the Supreme Court's long line of cases affirming the application of equitable tolling. And our sister circuit courts of appeals have concluded that the doctrine of equitable tolling survives *Bowles* and applies to statutory filing deadlines. *See Ross-Tousey v. Neary*, 549 F.3d 1148 (7th Cir. 2008); *Diaz v. Kelly*, 515 F.3d 149 (2d Cir. 2008); *Coker v. Quarterman*, 270 Fed. App'x 305 (5th Cir. 2008). For this court to stake out the opposite position is lamentably unsupportable.

I.

No legal system can function without deadlines, but the majority's eradication of equitable tolling in proceedings before the United States Court of Appeals for Veterans Claims ("Veterans Court") creates a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them. It is the veteran who incurs the most devastating service-connected injury who will often be the least able to comply with rigidly enforced filing deadlines. Under the majority's approach, this veteran will be both "out

of luck and out of court," since failure to comply with the 120-day deadline prescribed in 38 U.S.C. § 7266(a) means that he forfeits all right to judicial review of his claim.

Two en banc panels of this court have held that the time limit for filing an action under section 7266(a) at the Veterans Court is subject to equitable tolling. *See Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002); *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998). We have recognized that "[i]t would be both ironic and inhumane to rigidly implement section 7266(a) because the condition preventing a veteran from timely filing is often the same illness for which compensation is sought." *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004).

Although a majority of this court now wants to jettison this well-established, salutary precedent, *Bowles* provides a very flimsy foundation for doing so. *Bowles* neither addresses nor undermines this court's rationale for permitting equitable tolling in actions brought in the Veterans Court. The application of equitable tolling under section 7266(a) flows directly from the Supreme Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). *Irwin* was not—and could not have been—at issue in *Bowles*. The *Irwin* presumption of equitable tolling applies only when the federal government is the defendant in an action. 498 U.S. at 95-96. In *Bowles*, on the other hand, a state prisoner brought a federal habeas petition, and the state, not the federal government, was the defendant. *See* 551 U.S. at 207.

Irwin's equitable tolling principles were therefore clearly not at issue in *Bowles*, and it is for this reason that the majority opinion there did not cite, much less seek to distinguish, *Irwin*. It was because the doctrine of equitable tolling was not available that the petitioner in *Bowles* attempted to rely on the "unique circumstances" doctrine to excuse his untimely filing. *See Bowles*, 551 U.S. at 213-14; *see also Sierra Club N. Star Chapter v. Peters*, No. 07-2593, 2008 U.S. Dist. LEXIS 39966, at *21 (D. Minn. 2008) (concluding that *Bowles* is simply "not relevant" to the application of equitable tolling under *Irwin*).

If there was any doubt that *Bowles* left the *Irwin* doctrine of equitable tolling unscathed, it was dispelled by the Supreme Court's recent decision in *Sand & Gravel*. There the Court reaffirmed the continuing vitality of the *Irwin* presumption of equitable tolling, although the Court ultimately concluded that the presumption had been rebutted with respect to the filing of suit under 28 U.S.C. § 2501 at the United States Court of Federal Claims.[1] *Sand & Gravel*, 552 U.S. at 133-38. Simply put, "*Irwin* remains good law." *Santos v. United States*, 559 F.3d 189, 197 (3d Cir. 2009). Because our application of equitable tolling at the Veterans Court flows directly from *Irwin*, nothing in *Bowles* provides a sufficient basis for casting aside our long-established equitable tolling jurisprudence.

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1. The Court concluded that the "definitive earlier interpretation of the statute" applicable to suits filed in the Court of Federal Claims "offer[ed] a . . . sufficient rebuttal" to the *Irwin* presumption. *Sand & Gravel*, 552 U.S. at 137-38.

The majority seizes upon the following sentence from *Bowles*: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." 551 U.S. at 214. When read in context, however, it is clear that this statement means only that the appellate filing deadline set by Rule 4 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2107(a) is jurisdictional in nature.[2] *Bowles* begins its analysis by stating that it is addressing the question of "whether the Court of Appeals lacked jurisdiction to entertain an appeal filed outside the 14-day window allowed by § 2107(c)." 551 U.S. at 209. The Court then proceeds to answer that narrow question by analyzing cases appealed from one Article III court to another Article III court. Over and over again in its relatively brief opinion, the Supreme Court focuses on appeals from a district court to a court of appeals. *See id.* at 210 ("[E]ven prior to the creation of *the circuit courts of appeals*, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction." (emphasis added)); *id.* ("*[T]he courts of appeals* routinely and uniformly dismiss untimely appeals for lack of jurisdiction." (emphasis added)); *id.* at 213 ("Bowles' failure to file his notice of appeal in accordance with the statute . . . deprived *the Court of Appeals* of jurisdiction." (emphasis added)). Notably, each of the cases cited by the Court to support its conclusion that the filing of a notice of appeal within a statutorily prescribed period

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2. Fed. R. App. P. 4 "carries [28 U.S.C. § 2107(c)] into practice" and "describes the district court's authority to reopen and extend the time for filing a notice of appeal." *Bowles*, 551 U.S. at 208.

is "mandatory and jurisdictional" involved appeals from one Article III court to another. *Id.* at 209-10. Because *Bowles* is limited, by its facts and the cases upon which it relies, to appeals from one Article III court to another, it does not speak to the separate issue of whether equitable tolling applies to judicial review of agency decisions.

A fundamental fallacy underlying the majority's approach to section 7266(a) is that it confuses extending a limitations period with suspending one. *Bowles* addressed the question of whether a district court could extend the statutory time limit for reopening an appeal from fourteen to seventeen days. 551 U.S. at 209-10. Tolling does not extend any statutory deadline; instead it "temporarily halts" the running of the statutory clock. *See Jaquay*, 304 F.3d at 1281 n.2. "Principles of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped." *United States v. Ibarra*, 502 U.S. 1, 4 n.2, 112 S. Ct. 4, 116 L. Ed. 2d 1 (1991). While *Bowles* considered the question of whether a district court had authority to extend a statutory deadline for filing an appeal, it said nothing about whether a particular limitations period could be suspended because of equitable considerations. Here, the relevant inquiry is not whether the Veterans Court can extend the 120-day filing period, but whether the running of the statutory period is suspended during periods when a veteran is physically or mentally incapacitated.

A second significant difficulty with the majority's approach is that it applies *Bowles* to the wrong filing deadline. *Bowles* addresses the jurisdictional significance of the time limit for appealing a district court decision to a court of appeals. In the veterans' adjudicatory system, an appeal from the Veterans Court to this court is the procedural equivalent of an appeal from a district court to a court of appeals. *See* 38 U.S.C. § 7292 (providing that appeals from the Veterans Court to this court are to be taken "within the time and in the manner prescribed for appeals to United States courts of appeal from United States district courts"). Thus, even assuming *arguendo* that *Bowles* can be extended to the system for adjudicating veterans' claims, it would make the time limit for appealing *from* the Veterans Court—instead of the time limit for appealing *to* the court—jurisdictional in nature. *See Henderson v. Peake*, 22 Vet. App. 217, 224 n.2 (2008) (Schoelen, J., dissenting) ("[I]f anything, *Bowles* supports the Federal Circuit's practice of refusing to allow equitable tolling for appeals from [the Veterans Court] to the Federal Circuit.").

The third and most important error infecting the majority's analysis is that it fails to properly differentiate between deadlines for bringing suit and those for filing appeals. A trial court's judgment is presumed "correct and final, except only for such review and revision as are specified in the statute authorizing and establishing the pre-conditions for appeal." *Bailey*, 160 F.3d at 1370 (Michel, J., concurring). Thus, an "appellate court['s] power of review is sharply limited, for judgments are reviewable only if both final and

adverse to the party appealing and . . . filed within the time required by statute." *Id.* This is precisely what *Bowles* recognizes: if an appeal of a court's judgment "has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." 551 U.S. at 213 (citations and internal quotation marks omitted); *see Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982). (Filing an appeal of a district court decision "is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

In contrast to time limits for appeal, deadlines for bringing suit are generally not deemed jurisdictional. They are instead viewed as statutes of limitations, subject to equitable tolling. *See Sand & Gravel*, 552 U.S. at 133 ("Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims" and "typically permit courts to toll the limitations period in light of special equitable considerations."); *Rotella v. Wood*, 528 U.S. 549, 560, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000) ("[F]ederal statutes of limitations are generally subject to equitable principles of tolling."). The Supreme Court has made clear that time limits for seeking initial court review of adverse agency actions are generally classified as statutes of limitations rather than jurisdictional bars. In *Bowen v. City of New York*, 476 U.S. 467, 480-81, 106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986), the Court unanimously ruled that equitable

tolling applies to the statutory sixty-day period for bringing an action in district court to review a denial of Social Security disability benefits by the Secretary of Health and Human Services. Likewise, in *Irwin*, the Court held that equitable tolling applies to the statutory thirty-day period for seeking review in district court of a final action by the Equal Employment Opportunity Commission ("EEOC"). 498 U.S. at 95-97.

Just as the statutes construed in *Bowen* and *Irwin*, section 7266(a) provides a time limit for seeking initial court review of an adverse agency action. *See Jaquay*, 304 F.3d at 1286 ("[T]he filing of a notice of appeal at the Veterans Court, like the filing of a complaint in a trial court, is the first action taken by a veteran in a court of law."). Furthermore, like the Social Security benefits scheme involved in *Bowen* and the employment discrimination scheme addressed in *Irwin*, the veterans' benefits system is an adjudicatory framework "that Congress designed to be unusually protective of claimants." *Bowen*, 476 U.S. at 480 (internal quotation marks omitted); *see Jaquay*, 304 F.3d at 1280 ("Congress has created a paternalistic veterans' benefits system to care for those who served their country in uniform."). Because section 7266(a) is similar in most important respects to the statutes at issue in *Bowen* and *Irwin*, and is fundamentally different from that addressed in *Bowles*, it is properly viewed as a statute of limitations rather than a rigid jurisdictional bar.

Stone v. Immigration & Naturalization Service, 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995),

upon which the majority relies, is not to the contrary. *Stone* held that the time limit for appealing a final deportation order issued by the Board of Immigration Appeals is not amenable to equitable tolling. *Id.* at 405. Removal proceedings, however, "closely resemble a trial" and "are adversarial and employ many of the same procedures used in Article III courts." *Frango v. Gonzales*, 437 F.3d 726, 728 (8th Cir. 2006) (citations and internal quotation marks omitted); *Etchu-Njang v. Gonzales*, 403 F.3d 577, 583 (8th Cir. 2005) (contrasting "adversarial" removal proceedings with "inquisitorial" Social Security benefit proceedings). Because the appeal of a final deportation order is very similar to an appeal from a district court decision, it is not surprising that the Court determined that the deadline for appealing a deportation order is not subject to equitable tolling. Indeed, *Stone* itself recognizes that its decision to preclude equitable tolling was an aberration, and the general rule is that tolling applies to time limits for bringing suit against the federal government. 514 U.S. at 398 ("Underlying considerations of administrative and judicial efficiency . . . support our conclusion that Congress intended to depart from the conventional tolling rule in deportation cases.")

When a veteran brings a claim before the Board of Veterans' Appeals ("board"), "the relationship between the veteran and the government is non-adversarial and pro-claimant." *Jaquay*, 304 F.3d at 1282. Thus, unlike deportation actions, proceedings before the board are fundamentally unlike proceedings before a district court. *See Bailey*, 160 F.3d at 1370 (Michel, J.,

concurring) (explaining that the board "is not a trial court"); *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (en banc) (Mayer, C.J., dissenting) (Board proceedings are "entirely inquisitorial" in that their purpose "is to ensure that the veteran receives whatever benefits he is entitled to, not to litigate as though it were a tort case.") Because board proceedings are non-adversarial in nature, it is the Supreme Court's decisions in *Irwin* and *Bowen*, not *Stone*, which control.

II.

"Obedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing." *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir. 2007). As other circuits have correctly recognized, it is an "unwarranted extension of *Bowles* to think that the Court was impliedly rendering equitable tolling inapplicable to limitations periods just because they are set forth in statutes." *Diaz*, 515 F.3d at 153. Interpreting *Bowles* to apply to every statutory filing deadline "would overturn huge swaths of established case law." *Ross-Tousey*, 549 F.3d at 1155. Thus, in the wake of *Bowles*, many courts have concluded that the doctrine of equitable tolling is alive and well and can appropriately be applied to many different filing deadlines. *See*, *e.g.*, *Rouse v. Dep't of State*, 567 F.3d 408, 417 (9th Cir. 2009) (applying equitable tolling to the limitations period for filing claims under the Privacy Act); *Santos*, 559 F.3d at 194-97 (concluding that equitable tolling is available

under the Federal Tort Claims Act); *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (2d Cir. 2009) (concluding that *Bowles* did not invalidate the application of equitable tolling to the time limit for claims under the Antiterrorism and Effective Death Penalty Act ("AEDPA")); *Ross-Tousey*, 549 F.3d at 1155 (concluding that the deadline for filing a motion to dismiss under Chapter 7 of the Bankruptcy Code was not jurisdictional); *Diaz*, 515 F.3d at 153 (concluding that equitable tolling applies under the AEDPA); *Percy v. Shinseki*, 23 Vet. App. 37, 44 (2009) (concluding that the time limit for filing a substantive appeal to the board under 38 U.S.C. § 7105(d)(3) is not jurisdictional); *Engel v. 34 E. Putnam Ave. Corp.*, 552 F. Supp. 2d 291, 294 (D. Conn. 2008) (concluding that the 30-day period for filing a motion to remand a case under 28 U.S.C. § 1447(c) was not jurisdictional); *but see*, *e.g.*, *United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009) (concluding, in light of *Bowles*, that the statutory timing provision for criminal appeals from the United States Navy-Marine Corps Court of Criminal Appeals, 10 U.S.C. § 867(b), is "jurisdictional" and not susceptible to equitable tolling).

Indeed, in an aptly titled case, *United States v. Henderson*, 536 F.3d 776, 779 (7th Cir. 2008), the Seventh Circuit correctly determined that, notwithstanding *Bowles*, not all statutory time for appeal provisions are jurisdictional. At issue there was the time for appeal provision contained in 18 U.S.C. § 3731, which provides that the government has the right to appeal "a decision or order of a district court suppressing or excluding evidence" so long as the appeal is "taken within thirty days after the decision, judgment or order has been rendered."

536 F.3d at 778. Although the government failed to file its appeal within the statutorily prescribed period, the Seventh Circuit rejected the contention that *Bowles* required dismissal of the appeal. *Id*. at 778-79. The court explained that "*Bowles* considered whether a court may make an exception to a statutorily imposed time limit for filing an appeal; it did not involve the separate question of when such a time limit begins to run." *Id*. at 779 n.2.[3] A similar analysis can be applied here. Even assuming *arguendo* that *Bowles* precludes the Veterans Court from making "exceptions" to section 7266(a)'s limitations period, it does not specify when the limitations period begins to run. Accordingly, there is nothing in *Bowles* to prevent a determination that the statutory period does not begin to run or, as discussed previously, is suspended during periods when a veteran is physically or mentally incapacitated.

III.

"It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49-50, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002) (citations and internal quotation marks omitted). Thus, in analyzing section

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3. The court ultimately concluded that the statutory period for filing an appeal did not begin to run during the pendency of a timely filed motion for reconsideration, notwithstanding the fact that the statute provided that appeals had to be taken within thirty days of a district court decision. *Henderson*, 536 F.3d at 779 n.2.

7266(a), the key inquiry is whether "there [is] a good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States v. Brockamp*, 519 U.S. 347, 350, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997) (emphasis in original)); *Sand & Gravel*, 552 U.S. at 138 (noting that the *Irwin* presumption of equitable tolling can be rebutted "by demonstrating Congress' intent to the contrary"); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."). The majority adduces nothing to demonstrate that Congress intended to preclude the application of equitable tolling in proceedings before the Veterans Court. To the contrary, section 7266(a)'s language, legislative history and placement within a uniquely benevolent adjudicatory scheme compel the conclusion that it was designed to function as a statute of limitations rather than an inflexible jurisdictional bar.

A. *Limits on a Court's Reviewing Authority*

The Supreme Court has historically distinguished between statutes that address the power of a court to hear a case and those that impose timely filing obligations on individual litigants. *See Kontrick v. Ryan*, 540 U.S. 443, 453-55, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) (discussing the difference between a court's authority to hear a case, and rules that simply tell a court how to process claims in cases that Congress has permitted the courts to hear). While the former are

mandatory and jurisdictional, the latter are not, and can be equitably tolled in appropriate circumstances. *See id*. The statute at issue in *Bowles* contains an express limit on the power of Article III courts to hear appeals. *See* 28 U.S.C. § 2107(a) ("[N]o appeal shall bring any judgment . . . before a court of appeals for review unless notice of appeal is filed . . . within thirty days after the entry of . . . judgment."). Given this explicit limit on judicial authority, it is not surprising that the Supreme Court determined that the failure to file within the period specified in the statute "deprived the Court of Appeals of jurisdiction." *Bowles*, 551 U.S. at 213.

Here, in contrast, section 7266(a) is not framed as an express limit on the authority of the reviewing tribunal, but instead speaks only to the actions a veteran must take to bring his claim:

> In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

38 U.S.C. § 7266(a).

Because the statute at issue here, unlike the statute at issue in *Bowles*, does not contain an explicit limitation on the authority of the reviewing court, it is properly

classified as a claims-processing rule, which, while serving the salutary purpose of protecting against stale claims, is not imbued with the jurisdictional heft of a statutory limit on judicial authority. *See Kontrick*, 540 U.S. at 455 ("Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.").

Tellingly, Congress considered, but rejected, language that might have made section 7266(a) jurisdictional in nature. When it was wrestling with different approaches to judicial review of veterans' claims, a Senate bill proposed direct review of board decisions by the regional circuit courts of appeals. It stated that "no action [for judicial review] may be brought" unless the request for review "is filed not more than 180 days after" notice of the board's decision. S. 11, 100th Cong., 2d Sess. § 4025(g)(1). That language "was clearly jurisdictional in nature," *Bailey*, 160 F.3d at 1372 (Bryson, J., dissenting), similar in many respects to the language of the statute deemed jurisdictional in *Bowles*. *See* 28 U.S.C. § 2107(a) ("[N]o appeal shall bring any judgment . . . before a court of appeals for review unless notice of appeal is filed . . . within thirty days after the entry of . . . judgment."). Because Congress ultimately rejected language that would have framed the deadline for filing at the Veterans Court as a limit on the power of the court to hear a case, we can presume that it did not intend for section 7266(a) to serve as a

jurisdictional bar. *See Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785, 2009 U.S. App. LEXIS 21361, at *37 (Fed. Cir. Sept. 29, 2009) ("Of course, a central factor in determining whether a particular statute is subject to equitable tolling is the language used to set forth the time limitation.").

The language Congress ultimately selected for framing the deadline for filing appeals to the Veterans Court, however, is remarkably similar to the language it choose to set forth the time limit for bringing a challenge to a final EEOC action in the statute addressed in *Irwin*. There the statute provided that "an employment discrimination complaint against the Federal Government under Title VII must be filed 'within thirty days of receipt of notice of final action taken' by the EEOC." *Irwin*, 498 U.S. at 92 (quoting 42 U.S. C. § 2000e-16(c)). Because section 7266(a), like the *Irwin* statute, imposes timely filing obligations on an individual litigant seeking court review of an adverse agency action, instead of imposing limits on the authority of a reviewing tribunal, it is properly viewed as a statute of limitations rather than a jurisdictional bar.

Little, if any, significance can be attached to the fact that during the period when Congress was wrestling with different approaches to providing judicial review of veterans' claims, a bill in the House provided that the time period for filing at the Veterans Court could be extended "for good cause shown." *See* H.R. 5288, 100th Cong., 2d Sess. § 4015(d)(1). This bill also proposed eliminating the board and replacing it with a 65-judge

Court of Veterans Appeals that would have had responsibility for direct review of decisions from the Veterans Affairs' regional offices. *Id.* at § 4003. Because the good cause exception was part of an adjudicatory framework that was ultimately rejected by Congress, it is not surprising that there is no explicit good cause exception in the final version of section 7266(a). Indeed, by the time Congress finally passed the Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105, in 1988, the Supreme Court had already determined that equitable tolling applied to the time limits for bringing challenges to adverse agency decisions. *See Bowen*, 476 U.S. at 477-79. Under such circumstances, it would have been superfluous to include a provision allowing tolling of the limitations period under section 7266(a). *See Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501, 106 S. Ct. 755, 88 L. Ed. 2d 859 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

The majority makes much too much of the fact that the filing a veteran uses to commence litigation at the Veterans Court is styled a "notice of appeal." Presumably, Congress only used the term "notice of appeal" in section 7266(a) to distinguish the filing a veteran makes at the Veterans Court from the one he makes at the board, which is called a "notice of disagreement." *See* 38 U.S.C. § 7105. There is not a scintilla of evidence in the legislative history to indicate that Congress used the term "notice of appeal" in section

7266(a) in order to equate the filing a veteran makes at the Veterans Court with the filing a litigant makes to appeal a final district court judgment. To the contrary, Congress uses the term "appeal" throughout Title 38 whenever it wishes to refer to a veteran's challenge to a prior determination, regardless of whether that determination is from the regional office or the board. *See, e.g.*, 38 U.S.C. § 7101 referring to the board as "the Board of Veterans' *Appeals*" (emphasis added)); *id.* at § 7104 (discussing "appeals" to the board); *id.* at § 7105(b)(2) ("Notices of disagreement, and *appeals* [to the board], must be in writing."); *id.* at § 7105(d)(5) ("The Board of Veterans' Appeals may dismiss any *appeal* which fails to allege specific error." (emphasis added)). To conclude that a notice of appeal to the Veterans Court is equivalent to a notice of appeal to a circuit court of appeals is to exalt semantics over substance. *See Henderson*, 22 Vet. App. at 223 (Schoelen, J., dissenting) ("I do not believe the Supreme Court's use of the term 'notice of appeal' in *Bowles* is interchangeable with the use of the term in 38 U.S.C. § 7266(a), and I remain unconvinced that *Bowles* compels the result reached today."); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S. Ct. 570, 116 L. Ed. 2d 578 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.").

It should be noted, moreover, that *Bowles* addresses the jurisdictional magnitude of Rule 4 of the Federal Rules of Appellate Procedure. *See* 551 U.S. at 208-10. The Federal Rules of Appellate Procedure, however, "govern appeals from Article III district courts" and

are "inapplicable to the [Veterans Court], an Article I Court." *Bailey*, 160 F.3d at 1367; *see also Oja v. Dep't of Army*, 405 F.3d 1349, 1359 (Fed. Cir. 2005) (concluding that the time limit to appeal to this court from the Merit Systems Protection Board is jurisdictional because such appeals are governed by the Federal Rules of Appellate Procedure). The Federal Rules of Appellate Procedure are "legislative in nature," *Bailey*, 160 F.3d at 1367, and it is therefore not surprising that the Supreme Court concluded in *Bowles* that Rule 4 was imbued with jurisdictional significance.

B. *The Brockamp Factors*

The Supreme Court has identified several factors as important in determining whether Congress intended equitable tolling to apply to a particular statutory time limit: (1) whether the language setting forth the time limit is unusually detailed or technical in nature, (2) whether a statute contains multiple iterations of the limitations period, (3) whether a timing provision contains explicit exceptions to the filing deadline, and (4) the underlying subject matter of the statutory scheme in which the timing provision is found. *See Brockamp*, 519 U.S. at 350-53; *Kirkendall v. Dep't of Army*, 479 F.3d 830, 836-37 (Fed. Cir. 2007) (en banc). Here, each of these factors strongly supports the conclusion that Congress intended for equitable tolling to apply to the limitations period contained in section 7266(a).

Section 7266(a)'s filing deadline is set forth in simple terms, eschewing the use of technical jargon to set forth the limitations period. *See Brockamp*, 519 U.S. at 350 ("Ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception."); *Arctic Slope Native Ass'n*, 583 F.3d 785, 2009 U.S. App. LEXIS 21361, at *32-38 (concluding that the time for presenting a claim under the Contracts Disputes Act was subject to equitable tolling since the applicable timing provision was expressed in simple, non-technical language). Nor does section 7266(a) contain multiple iterations of the filing deadline. *Cf. Brockamp*, 519 U.S. at 350-51 (concluding that the time limit for seeking a tax refund was not subject to equitable exceptions where the statute "reiterate[d] its limitations several times in several different ways").

Moreover, section 7266(a) does not contain explicit exceptions to the time to file requirements. Applying the maxim *expressio unius est exclusio alterius*, the Supreme Court has made clear that the "explicit listing of exceptions" to the running of the limitations period must be considered by courts to be indicative of Congress' intent to preclude them from "read[ing] other unmentioned, open-ended, equitable exceptions into the statute." *Brockamp*, 519 U.S. at 352 (internal quotation marks omitted). In *Bowles*, the statute at issue already contained an explicit exception to the time to file requirements, allowing a district court to extend the filing period for fourteen days beyond the thirty-day period allotted to appeal a district court's final

judgment. *See* 28 U.S.C. § 2107(c). Here, in contrast, section 7266(a) "does not provide its own exceptions to the general rule" regarding when an action must be filed. *Bailey*, 160 F.3d at 1365; *see Arctic Slope Native Ass'n*, 583 F.3d 785, 2009 U.S. App. LEXIS 21361, at *32-38 (concluding that equitable tolling applies to a Contract Disputes Act timing provision which did not contain any express exceptions to the deadline for a contractor to submit claims).

By far the most important factor compelling the conclusion that equitable tolling applies to section 7266(a) is the fact that it is found in a uniquely pro-claimant adjudicatory scheme. *See Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) ("The government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them."); *Bailey*, 160 F.3d at 1370 (Michel, J., concurring) (The Veterans Court is "set in a *sui generis* adjudicative scheme for awarding benefit entitlements to a special class of citizens, those who risked harm to serve and defend their country."). The 120-day filing period must be interpreted not in a vacuum, but with a keen awareness that Congress created the Veterans Court in order "to ensure that veterans . . . receive all benefits to which they are entitled." S. Rep. No. 100-418, 100th Cong., 2d Sess. 29 (1988).[4] Equitable tolling does not excuse tardy filing in

4. The Veteran's Court seems to have lost sight of its mandate when it took it upon itself to "overrule" *Bailey* and *Jaquay*. In eradicating equitable tolling based on *Bowles*, the (Cont'd)

cases of simple ineptitude or garden variety neglect, *see Nelson v. Nicholson*, 489 F.3d 1380, 1384 (Fed. Cir. 2007), but it is a critically important safeguard in situations where a serious mental or physical infirmity renders it impossible for a veteran to comply with a rigidly enforced filing deadline.

The impetus for the creation of the Veterans Court was Congress' abiding concern that individuals who had put their lives on the line through service in the military had no right to have their claims for disability benefits reviewed in a court of law. *See*, *e.g.*, S. Rep. No. 100-418, 100th Cong., 2d Sess. 30-31 ("Under current law, a veteran . . . aggrieved by a final [board] decision is left without any further recourse. . . . This legislation is designed to ensure that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives . . . every benefit and service to which he or she is entitled under law."); *id.* at 50-51 ("[T]he committee continues to believe that providing an opportunity for those aggrieved by VA decisions to have such decisions reviewed by a court, in a manner similar to that enjoyed by claimants before almost all other Federal agencies, is necessary in order to provide such claimants with fundamental justice. . . . [J]udicial

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(Cont'd)

Veterans Court conveniently overlooked the fact that *Bowles* did not cite to, much less overrule, any case involving section 7266(a). Indeed, even the government acknowledges that the Veterans Court acted inappropriately in failing to follow binding precedent of this court on the question of whether equitable tolling applies in Veterans Court proceedings.

review, by opening the decisions of the VA to court scrutiny, will have a salutary effect on such decisions and on the VA decisionmaking process in general by involving the judiciary as a check on agency actions."). Given Congress' clearly expressed desire to provide veterans with access to the judicial system, interpreting section 7266(a) in a way that will deprive those who are incapable of meeting rigidly enforced deadlines of the right to judicial review is "as unsupportable as it is counterintuitive." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158, 123 S. Ct. 748, 154 L. Ed. 2d 653 (2002) (concluding that time limits specified in the Coal Industry Retiree Health Benefit Act of 1992 should not be construed in a way that might deprive compensation to the intended beneficiaries of the statute).

When it established the Veterans Court, Congress made clear that proceedings before the court were not to be overly "formalized," but instead were to be "[a]ccurate, informal, efficient, and fair." H.R. Rep. No. 100-963, 100th Cong., 2d Sess. 26 (1988). By eradicating equitable tolling, the majority creates a harsh and formalistic adjudicatory scheme that is the antithesis of what Congress intended. *See Forshey*, 284 F.3d at 1360 (Mayer, C.J., dissenting) ("Viewed in its entirety, the veterans' system is constructed as the antithesis of an adversarial, formalistic dispute resolving apparatus.").

The majority's approach to equitable tolling is particularly indefensible given that most veterans act *pro se* when they file their petitions for review in the Veterans Court. *See* U.S. Court of Appeals for Veterans

Claims Annual Report (2008), *available at* http//www.uscourts.cavc.gov/documents/Annual_Report_-_20081.pdf. The Supreme Court has cautioned that a strict reading of a filing provision is especially "inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982) (internal quotation marks omitted). Because so many veterans must file their petitions without the assistance of counsel, it is highly unlikely that Congress intended for section 7266(a) to serve as a harsh and inflexible jurisdictional bar.

To the contrary, Congress has given every indication that it sanctions equitable tolling in proceedings before the Veterans Court. In 1998, *Bailey* held that section 7266(a) was subject to equitable tolling. 160 F.3d at 1364-68. In the eleven years since *Bailey*, Congress has had ample opportunity to overturn the application of tolling in Veterans Court proceedings, but has declined to do so. Instead, in 2000, Congress enacted comprehensive revisions to the veterans' benefits system, *see* Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096, but did nothing to eliminate or circumscribe equitable tolling at the Veterans Court. In 2001, Congress specifically reviewed and then amended section 7266, repealing a provision that required a veteran to serve a notice of appeal on the Veterans Administration. *See* Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, § 507, 115 Stat. 976, 999. Again, however, Congress chose not to

disturb established equitable tolling jurisprudence. Under such circumstances, it is reasonable to assume that Congress agrees with equitable tolling in Veterans Court proceedings. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 699, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress [is] thoroughly familiar" with important court decisions when it enacts legislation.); *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 1978) ("Congress is presumed to be aware of court decisions construing statutes and may, of course, amend a statute as a result.").

Statistics from the Veterans Court make clear that the elimination of equitable tolling will deal a heavy blow to many deserving veterans. In 2008, the Veterans Court heard 3,542 appeals on the merits and reversed, vacated or remanded 2,184 of the board's decisions. *See* U.S. Court of Appeals for Veterans Claims Annual Report (2008), *available at* http://www.uscourts.cavc.gov/documents/Annual_Report_-_20081. pdf. Thus, veterans often mount successful challenges to adverse board decisions when they come before the Veterans Court. With the eradication of equitable tolling, many deserving veterans will be deprived of the right to have an erroneous board decision corrected on appeal. *See* Br. of Amicus Curiae United Spinal Assoc. at 14 (noting that since the Veterans Court abolished equitable tolling "it has dismissed over 130 appeals based on the inability of claimants to meet the filing requirements of § 7266, an average of over two dismissals a week").

While the abolition of equitable tolling will prove calamitous for many severely disabled veterans, its continuance would result in no prejudice to the government. All factual information must be presented during earlier proceedings, so a delay in bringing an action in Veterans Court will not hinder the government's ability to obtain evidence or present its case. *Bailey*, 160 F.3d at 1365 (Since section 7266(a) "addresses timeliness for an appeal from a closed record," the application of equitable tolling "does not threaten administrative complexity or unpredictable fiscal peril."). And because it often takes many years—in some cases several decades—to obtain service-connected benefits, the government is hardly in a position to complain that equitable tolling will result in inordinate delays. *See* James Dao, "Veterans Affairs Faces Surge of Disability Claims," N.Y. Times, July 12, 2009 (noting that the backlog of claims seeking service-connected benefits is now over 400,000); *Comer v. Peake*, 552 F.3d 1362, 1365-71 (Fed. Cir. 2009) (summarizing the hurdles faced by a mentally disabled veteran in his twenty-year struggle to obtain disability compensation).

This court often pays lip-service to "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *See King*, 502 U.S. at 220 n.9; *Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994). In reality, however, it not infrequently fails in its "fundamental obligation to apply the law, when the issue is an open one, in favor of the veteran." *Schism v. United States*, 316 F.3d 1259, 1311 (Fed. Cir. 2002) (Plager, J.,

dissenting). Even if this were a close case, which it is not, we would be obliged to resolve any interpretive doubt regarding whether equitable tolling applies to section 7266 in the veteran's favor. *Cf. Kirkendall*, 479 F.3d at 843.

IV.

Four justices of the Supreme Court thought the result in *Bowles* was fundamentally unfair. *See* 551 U.S. at 215 (Souter, J., joined by Stevens, Ginsburg and Breyer, JJ., dissenting) ("It is intolerable for the judicial system to treat people this way."). The facts here are far more compelling. Bowles was a convicted murderer, and had a jury trial, a direct appeal and a federal district court review of his habeas corpus application. His untimely filing resulted only in the loss of the right to have the denial of his habeas petition reviewed by an appellate court.

Henderson was discharged from active military duty due to service-connected paranoid schizophrenia. His psychiatrist reports that he is "incapable of rational thought or deliberate decision-making" and "incapable of understanding and meeting deadlines." A1028. Acting *pro se*, Henderson filed an action challenging the board's decision denying him monthly compensation for at-home care, but his complaint was dismissed because it was filed a mere fifteen days outside the 120-day filing period specified in section 7266(a). Because the majority has seen fit to renounce equitable tolling, Henderson will be deprived of all right to judicial review of his claim. So

while *Bowles*, a convicted murderer, had several opportunities to present his case in a court of law, Henderson will have none.

The majority does not dispute that Henderson's mental illness rendered him incapable of meeting section 7266(a)'s filing deadline. Nor can it dispute that Bowles does not mention, much less explicitly overrule, this court's well-established precedent applying equitable tolling in proceedings before the Veterans Court. Yet the majority construes *Bowles* in a way that will deprive many deserving veterans of all right to judicial review. But "[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service . . . ." *Porter v. McCollum*, No. 08-10537, 130 S. Ct. 447, 175 L. Ed. 2d 398, 2009 U.S. LEXIS 8377, at *22-23 (U.S. Nov. 30, 2009). Eliminating equitable tolling deprives deserving veterans of the leniency they are due and makes a mockery of the pro-claimant adjudicatory system Congress intended to create. Those "who have been obliged to drop their own affairs to take up the burdens of the nation" through service in the military, *Boone v. Lightner*, 319 U.S. 561, 575, 63 S. Ct. 1223, 87 L. Ed. 1587 (1943), deserve far better.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS DECIDED JULY 24, 2008

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 05-0090.

David L. HENDERSON,

Appellant,

v.

James B. PEAKE, M.D.,
Secretary of Veterans Affairs,

Appellee.

Argued Nov. 17, 2007.
Decided July 24, 2008.

Before GREENE, Chief Judge, and HAGEL and SCHOELEN, Judges.

GREENE, Chief Judge:

Before the Court is Mr. Henderson's appeal of an August 30, 2004, decision of the Board of Veterans' Appeals (Board) that denied entitlement to Department of Veterans Affairs (VA) special monthly compensation. Mr. Henderson's Notice of Appeal (NOA) was received

on January 12, 2005, more than 120 days after the Board decision was mailed. Consequently, he was ordered to show cause why his appeal should not be dismissed as untimely. Mr. Henderson requested that the time for filing his NOA to the Court be extended because his VA service-connected disability prevented him from timely filing his appeal of the Board decision. Subsequently, Mr. Henderson was ordered to provide additional information, including medical or other evidence, to support a basis for equitable tolling as authorized under *Barrett v. Principi,* 363 F.3d 1316 (Fed.Cir.2004). In response, Mr. Henderson submitted a letter from his private psychiatrist describing the effects of his disability. After considering the evidence submitted, in a single-judge order the Court dismissed the appeal for lack of jurisdiction.

Mr. Henderson sought reconsideration of the dismissal and that request was granted. The matter was submitted to a panel for disposition. During the pendency of the appeal, the United States Supreme Court decided *Bowles v. Russell,* 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007), which addressed whether filing an NOA is a jurisdictional requirement in Federal appellate courts, and thus, cannot be equitably tolled. In light of that decision, the Court ordered the parties to submit supplemental memoranda of law. Subsequent to those filings, Mr. Henderson submitted a Notice of Supplemental Authority pursuant to Rule 30(b) of the Court's Rules of Practice and Procedure. The Secretary moved to strike Mr. Henderson's Notice of Supplemental Authority on the grounds that it does not comply with

Rule 30(b). The Secretary's pending motion to strike portions of Mr. Henderson's Notice of Supplemental Authority will be denied as moot.

Oral argument regarding this matter was held on November 16, 2007. Mr. Henderson argues that *Bowles* does not disturb the precedent established in *Bailey v. West,* in which the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that equitable tolling is available for NOAs filed at this Court. *See* 160 F.3d 1360 (Fed.Cir.1998). The Secretary maintains that *Bowles* has created a bright-line rule that equitable tolling can no longer excuse untimely NOAs in this Court. It is the question rising from these positions that the Court now considers.

In *Bowles,* Mr. Bowles petitioned a U.S. district court to permit him, under rule 4(a)(6) of the Federal Rules of Appellate Procedure, which are statutorily enacted rules, to file an appeal after the time prescribed by statute for such an appeal had expired. Rule 4(a)(6) permits a district judge to extend the time to file an appeal for a period of 14 days from the day the district court grants the motion. *See* 28 U.S.C. § 2107(c). In granting Mr. Bowles's motion, the district court erroneously and inexplicably gave Mr. Bowles 17 days to file his appeal rather than the statutorily prescribed 14 days. Mr. Bowles filed his NOA 16 days later, one day earlier than prescribed by the district court, but two days after the 14-day period provided by statute had expired. The respondent in *Bowles* argued that the United States Court of Appeals for the Sixth Circuit

lacked jurisdiction to hear Mr. Bowles's appeal because it was filed beyond the 14-day period prescribed by statute. The Supreme Court agreed. *Bowles,* 127 S.Ct. at 2363 ("This Court has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.' " (citations omitted)). After considering and distinguishing several situations that do not qualify as jurisdictional time limits,[1] the Supreme Court held unequivocally: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Id.* at 2366. With this mandate, we review the statutes authorizing this Court to conduct its judicial appellate review.

First, just as Congress created appellate courts in each circuit as "a court of record, known as the United States Court of Appeals for the circuit" under Article III of the Constitution, 28 U.S.C. § 43(a), this Court was established under Article I as "a court of record to be known as the United Stated Court of Appeals for

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1. *See, e.g., Arbaugh v. Y & H Corp.,* 546 U.S. 500, 505, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (holding that employee numerosity requirement was statutory limitation, not time limit); *Scarborough v. Principi,* 541 U.S. 401, 413, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004) (finding that court had plenary jurisdiction over matters ancillary to judgment of court, including application for fees under Equal Access to Justice Act); *Kontrick v. Ryan,* 540 U.S. 443, 448, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (holding that failure to comply with Federal Rule of Bankruptcy procedure was not jurisdictional because such rules were not statutory, but were rules issued by court for orderly transaction of its business).

Veterans Claims," 38 U.S.C. § 7251. Second, it is well settled that the proceedings of this Court are "civil actions." *See Scarborough,* 541 U.S. at 413, 124 S.Ct. 1856 (applying Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), to this Court and specifically referring to underlying action as "*civil action*"); *see also Abbs v. Principi,* 237 F.3d 1342, 1348 (Fed.Cir.2001) (*civil actions* against VA are brought in Court of Appeals for Veterans Claims). Third, this Court's appellate jurisdiction derives exclusively from statutory grants of authority enacted by Congress and may not be extended beyond that permitted by law. *See Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 818, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988). The time to file an appeal in this Court is prescribed by statute, not by a Court rule. *See* 38 U.S.C. § 7266(a). To obtain appellate review in this Court, an NOA must be filed with the Court within 120 days after notice of the Board decision is mailed to an appellant. *Id.* The ultimate burden of establishing jurisdiction rests with the appellant. *See McNutt v. G.M.A.C.,* 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *Bethea v. Derwinski,* 2 Vet.App. 252 (1992).

In *Bailey,* 160 F.3d at 1365, the Federal Circuit held that the part of section 7266 governing this Court's review authority was subject to equitable tolling under *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95-96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (once Congress has waived sovereign immunity, rule of equitable tolling is applicable in same way it would be in private suits). It did so on the basis that section 7266

was more like a statute of limitations in nature than a jurisdictional requirement and that the Supreme Court had not provided a distinction between the two. *Bailey,* 160 F.3d at 1364 ("*Irwin* does not distinguish among the various kinds of time limitations that may act as conditions to the waiver of sovereign immunity required to permit a cause of action to be pitched against the United States.").

In *Bowles,* the Supreme Court provided the distinction between statutes of limitation and jurisdictional requirements not found in *Irwin* and held that in civil cases statutory time periods limiting the time for filing an NOA are jurisdictional in the strict sense and are not subject to equitable tolling. *Bowles,* 127 S.Ct. at 2365. The *Bowles* opinion emphasized that its reasoning was based on the statutory origin of the time limitation and thus made clear that timelimits expressed in statutes for filing an appeal limit subject-matter jurisdiction. *Id.* Specifically, the Supreme Court held: "[T]he timely filing of [an NOA] in a civil case is a jurisdictional requirement," and courts have "no authority to create equitable exceptions to jurisdictional requirements." *Id.* at 2366.

We recognize the beneficent foundation that, in part, led the Federal Circuit to apply equitable tolling to the 120-day judicial-appeal filing period for NOAs to this Court. *See Bailey,* 160 F.3d at 1365 (appellant's reliance on VA employee's statement that appeal would be processed was sufficient for equitable tolling of

judicial-appeal period after VA employee failed to timely file appeal with Court). Later, the Federal Circuit further expanded equitable tolling of the time period established in section 7266(a) to situations including physical and mental illness that prevents a veteran from timely filing an NOA. *See Arbas v. Nicholson,* 403 F.3d 1379 (Fed.Cir.2005); *Barrett,* 363 F.3d 1316. However, *Bowles* establishes that the premise upon which the Federal Circuit in *Bailey* and its progeny applied *Irwin* to the time period established in section 7266(a) can no longer stand. According to *Bowles,* although a simple "claim-processing rule" may be waived or equitably tolled, 127 S.Ct. at 2364, "the taking of an appeal in a civil case within the time prescribed by statute is 'mandatory and jurisdictional'," *id.* at 2363 (quoting *Griggs v. Provident Consumer Disc. Co.,* 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (per curiam)). This Court's appellate review of Board decisions is distinguishable from the type of case considered in *Irwin,* where the petitioner who was seeking equitable tolling had filed against a Federal agency in a U.S. Federal district court, a complaint, not an NOA. *See Irwin,* 498 U.S. at 96, 111 S.Ct. 453 (statutes of limitations in actions against Government are subject to same rebuttable presumption of equitable tolling applicable to suits against private defendants). Congress has specifically authorized this Court to conduct, upon receipt of a statutorily required and timely filed NOA, independent judicial*appellate review* of a Federal agency decision. *See*38 U.S.C. §§ 7252 (granting Court exclusive jurisdiction to review decisions of Board), 7261 (limiting

scope of Court's review), and 7266(a) (review of Board decision initiated by NOA); *Frankel v. Derwinski,* 1 Vet.App. 23, 25 (1990) (examining Court's authority as appellate court); *see also*H.R.Rep. No. 100-963, at 4 (1988) (purpose of creating Veterans Court was to "establish an independent court" to review Board decisions). While *Irwin* applies to the equitable tolling of claims-processing rules, *Bowles* unequivocally provides the rule for the statutory appeal period governing judicial appeals to this Court.[2] *See Bowles,* 127 S.Ct. at 2363.

The same legislation that created this Court also contained provisions for the filing of administrative appeals within the Agency and explicitly permitted relief from prescribed appeal periods within the Agency. *See, e.g.,* 38 U.S.C. § 7105(b), (c) (permitting Secretary to prescribe regulations to allow claim even if appeal

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2. Although the Supreme Court has recently stated in *John R. Sand & Gravel v. U.S.* that *Irwin* survives after the *Bowles* decision, it must also be read to bar any extension of *Irwin* to NOAs filed at this Court. *See* 552 U.S. 130, 128 S.Ct. 750, 752, 169 L.Ed.2d 591 (2008) (anomaly created by *Irwin* and other cases merely reflects "a different judicial assumption about the comparative weight Congress would likely have attached to competing national interests"). Following the Supreme Court's guidance in *John R. Sand & Gravel,* the section 7266(a) 120-day period to file an NOA in this Court is properly classified as a jurisdiction conferring statute because it represents a limitation on a governmental waiver of sovereign immunity and is not designed to protect a defendant's "case specific interest in timeliness," as is the case with a claims-processing rule or statute of limitations. *Id.* at 753.

period has expired), (d)(3) (stating that 60-day period prescribed for filing "formal appeal" with Board of Veterans' Appeals "may be extended for a reasonable period on request for good cause shown"). Contrasting these provisions with the clear and unqualified time limit prescribed in section 7266(a) for appeals to this Court, we can draw no other conclusion than that, for the civil cases arising from appeals to this Court, there are no equitable exceptions to the 120-day judicial appeal period established by section 7266(a). *See Bowles, supra.*

We also recognize that even after *Bowles,* because an appeal to this Court is the first opportunity for an appellant to have his claim considered by a judicial body that is independent of the executive agency deciding his claim, one might be tempted to analogize the period provided to file such an appeal to a statute of limitations. However, the clarity and forcefulness with which *Bowles* speaks regarding the jurisdictional importance of congressionally imposed periods of appeal, requires us to abandon any such effort. To answer the questions posed by the dissent, as then—Circuit Judge Scalia stated in *National Black Media Coalition v. Federal Communications Commission*, no matter how compelling the circumstances, if a court does not have jurisdiction, it cannot act on a matter. *See*760 F.2d 1297, 1300 (D.C.Cir.1985).

Accordingly, Mr. Henderson's untimely NOA must be dismissed for lack of jurisdiction. *See Bowles,* 127 S.Ct. at 2366 ("[W]hen an 'appeal has not been prosecuted in the manner directed, within the time

limited by the acts of Congress, it must be dismissed for want of jurisdiction.' " (quoting *U.S. v. Curry,* 47 U.S. 106, 113, 6 How. 106, 12 L.Ed. 363 (1848))). Additionally, the Secretary's motion to strike portions of Mr. Henderson's Notice of Supplemental Authority is denied as moot.

Upon consideration of the foregoing, Mr. Henderson's appeal of the August 30, 2004, Board decision is DISMISSED.

GREENE, Chief Judge, filed the opinion of the Court.

Appendix B

SCHOELEN, Judge, dissenting:

Although I commend the majority for its lucid treatment of the issue before the Court, I must write separately because I do not believe the majority's analysis proceeds from the proper foundation. The Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) does not change the basis for the Court's authority to apply equitable tolling to 38 U.S.C. § 7266(a). The Court should apply existing precedent to evaluate whether equitable tolling is warranted in this case to excuse the late filing of the appellant's NOA. In the alternative, the majority should explain why its departure from existing precedent also forecloses equitable tolling on grounds different from those currently in force.

The majority acknowledges that in *Bailey v. West*, 160 F.3d 1360 (Fed.Cir.1998) (en banc) the Federal Circuit held that section 7266(a) was subject to equitable tolling, but the majority characterizes that holding as being "on the basis that section 7266 was more like a statute of limitations in nature than a jurisdictional requirement and that the Supreme Court had not provided a distinction between the two." *Ante* at 219 (citing 160 F.3d at 1364). The majority goes on to state that "[i]n *Bowles*, the Supreme Court provided the distinction between statutes of limitation and jurisdictional requirements not found in *Irwin [v. Department of Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990)] and held that in civil cases statutory time

periods limiting the time for filing an NOA are jurisdictional in the strict sense and are not subject to equitable tolling." *Ante* at 219 (citing *Bowles,* 127 S.Ct. at 2365). I do not believe that *Bowles* provides any such distinction or adds any clarity to this area of the law, and I believe the majority's analysis overlooks several significant aspects of *Bowles, Bailey*, and this Court's place in the adjudication of veterans benefits claims.

Basing its analysis on *Irwin,* the Federal Circuit in *Bailey* concluded that, "absent a contrary congressional expression, the Court [of Appeals for Veterans Claims] would be entitled to toll the statute of limitations found in section 7266." 160 F.3d at 1365. Here, the majority explains that recent Supreme Court precedent has stated that *Irwin* "survives" *Bowles* (*ante* at 220, n. 2 (citing *John R. Sand & Gravel v. United States,* 552 U.S. 130, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008))), but the majority then concludes that section 7266(a) "is properly classified as a jurisdiction conferring statute because it represents a limitation on a governmental waiver of sovereign immunity and is not designed to protect a defendant's 'case specific interest in timeliness,' as is the case with a claims processing rule or statute of limitations." *Ante* at 220, n. 2 (citing *John R. Sand & Gravel,* 128 S.Ct. at 753). The majority's explanation of *Irwin's* continued role in equitable tolling jurisprudence does not explain how *Bowles*—or any other case—changes the analysis of the governmental waiver of sovereign immunity that the Federal Circuit undertook in *Bailey,* and reaffirmed in *Jaquay v.*

Principi, 304 F.3d 1276 (Fed.Cir.2002) (en banc) and in *Kirkendall v. Dep't of the Army,* 479 F.3d 830, 842-44 (Fed.Cir.2007) (en banc), *cert. denied,* __ U.S. __, 128 S.Ct. 375, 169 L.Ed.2d 260 (2007).[1] Indeed, in *Bailey,* the Federal Circuit stated that "courts have recognized statutes of limitations as *limits to grants of jurisdiction,*" 160 F.3d at 1363 (emphasis added), and confirmed that analysis of section 7266 in this regard required the court to "go beyond the placement and nomenclature that Congress chose to express the metes and bounds of the *waiver of immunity.*" *Id.* (emphasis added). I believe that language signifies that the *Bailey*

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1. The majority states that *John R. Sand & Gravel* explains that any "anomaly created by *Irwin* and other cases merely reflects 'a different judicial assumption about the comparative weight Congress would likely have attached to competing legitimate interests.' " *Ante* at 220, n. 2 (citing *John R. Sand & Gravel,* 128 S.Ct. at 750).*John R. Sand & Gravel* does state that proposition, but it does so in the context of reaffirming *Irwin* and explaining that *Irwin* did not create a conflict with an older line of cases sufficiently grave to justify concluding that the older cases were overruled. *See John R. Sand & Gravel,* 128 S.Ct. at 755 (describing the critical difference between the statute reviewed in *Irwin* and the statute reviewed in *John R. Sand & Gravel:* The statute in *Irwin,* "while similar to the present statute in language, is unlike the present statute in the key respect that the Court had not previously provided a definitive interpretation"). Thus, the discussion in *John R. Sand & Gravel,* cited by the majority, amounts to a reaffirmation, through *stare decisis,* of *Irwin,* as well as the cases upon which the *John R. Sand & Gravel* holding was based. I therefore conclude that, rather than undermining or narrowing *Irwin* and cases based upon it, *John R. Sand & Gravel* reaffirms *Irwin's* vitality.

decision already explored the jurisdictional nature and scope of the waiver of sovereign immunity of section 7266(a), and this Court should follow that analysis.

The majority instead concludes that *Bowles* supersedes this sovereign immunity analysis because *Bowles* holds that "[t]he timely filing of [an NOA] *in a civil case* is a jurisdictional requirement," *ante* at 219 (emphasis added) (quoting *Bowles,* 127 S.Ct. at 2366), and proceedings at this Court are "civil actions," *ante* at 219. I have two objections to the majority's determinations in this regard.

First, I believe the majority reads *Bowles* without sufficient consideration of the statutory scheme that *Bowles* actually addresses. *Bowles* is about the jurisdiction of the United States Courts of Appeals constituted under Article III of the Constitution. Those courts "shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291. *Bowles* addresses Rule 4 of the Federal Rules of Appellate Procedure, of which section 4(a) governs appeals in civil cases and section 4(b) governs appeals in criminal cases. *See*FED. R.APP. P. 4. Rule 4, according to *Bowles,* "carries [28 U.S.C.] § 2107 into practice." *Bowles,* 127 S.Ct. at 2363.Section 2107 of title 28, U.S.Code, in turn provides that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals . . . unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree,"

28 U.S.C. § 2107(a), and also provides a mechanism by which a district court may "upon motion . . . extend the time for appeal upon a showing of excusable neglect or good cause . . . for a period of 14 days from the date of entry of the order reopening the time for appeal." 28 U.S.C. § 2107(c). Section 2107 makes no mention of criminal proceedings.

This entire construct depends on the prior issuance of a final decision of a U.S. district court. Rule 4 and section 2107 are not implicated until there is a final decision of a district court, according to section 1291. Once the district court's decision is final, should a party wish to appeal, the timing provisions of Rule 4 and section 2107 become relevant, and only then does it matter whether the case is a civil case or a criminal case because that distinction triggers the applicability (or not) of section 2107 and Rule 4(a)—and by extension the applicability of the holding in *Bowles.* Thus, *Bowles* governs the jurisdiction of an Article III appellate court reviewing a final decision of a district court in a civil, rather than criminal, case.

Furthermore, *Bailey* already includes analysis enabling this Court to distinguish the holding of *Bowles* from our jurisprudence: The Federal Circuit stated that Federal Rules of Appellate Procedure 4 and 26(b), as well as 28 U.S.C. § 2107, "govern appeals from Article III district courts and are inapplicable to the Court of [Appeals for Veterans Claims], an Article I court." *See Bailey,* 160 F.3d at 1367. This Court is not a district court or court of appeals constituted under Article III,

nor is the Board of Veterans' Appeals—the adjudicative body whose decisions this Court reviews—an Article III district court. *See* 38 U.S.C. § 7252(a) Although I agree with the majority's characterization of the proceedings in this Court as "civil," I do not believe that use of the term "civil case" in *Bowles* equates this Court's proceedings to those proceedings at issue in *Bowles* because *Bowles* deals with the Article III courts' appellate mechanism in civil cases, which differs from the mechanism by which cases are brought to this Court. As a consequence, I do not believe the Supreme Court's use of the term "notice of appeal" in *Bowles* is interchangeable with the use of the term in 38 U.S.C. § 7266(a), and I remain unconvinced that *Bowles* compels the result reached today. *See Jaquay,* 304 F.3d at 1286 ("[T]he filing of a notice of appeal at the Veterans Court, like the filing of a complaint in a trial court, is the first action taken by a veteran in a court of law."); *see also* 38 U.S.C. § 7292(a) (stating that review of this Court's decisions by the Federal Circuit "shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeals to United States courts of appeals from United States district courts").[2]

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2. Indeed, if anything, *Bowles* supports the Federal Circuit's practice of refusing to allow equitable tolling for appeals from this Court to the Federal Circuit, as the statute governing those appeals dictates that they be undertaken "within the time and in the manner prescribed for appeals to United States courts of appeals from United States district courts." 38 U.S.C. § 7292(a); *see also Oja v. Dep't of the Army,* 405 F.3d 1349, 1358 (Fed.Cir.2005).

Appendix B

My second objection to the majority's approach is that, once the majority concludes that *Bowles* has superseded *Bailey* and, by extension, *Irwin,* it fails to account for the possibility that other grounds may exist to support equitable tolling of section 7266(a)'s deadline. In *Bailey,* the Federal Circuit noted that, since the introduction of judicial review of VA benefits determinations wrought by the Veteran's Judicial Review Act, Pub.L. No. 100-687, 102 Stat. 4105 (1988), "it appears the system has changed from 'a nonadversarial, *ex parte,* paternalistic system for adjudicating veterans' claims,' to one in which veterans . . . must satisfy formal legal requirements, often without the benefit of legal counsel, before they are entitled to administrative and judicial review." *Bailey,* 160 F.3d at 1365 (quoting *Collaro v. West,* 136 F.3d 1304, 1309-10 (Fed.Cir.1998)). Also, concurring in *Bailey,* Judge Michel explained that the Court of Appeals for Veterans Claims "operates in a unique, paternalistic administrative environment," *Bailey,* 160 F.3d at 1368 (Michel, J., concurring), and that the *Bailey* decision itself "should be understood as derived from this uniquely benevolent statutory framework," *id.* at 1369. He summarized his views by stating that

> [t]he Board of Veterans' Appeals, of course, is not a trial court and the Court of [Appeals for Veterans Claims], while surely an appellate court, is an Article I court set in a sui generis adjudicative scheme for awarding benefit entitlements to a special class of citizens, those who risked harm to serve and defend

> their country. This entire scheme is imbued with special beneficence from a grateful sovereign. On this basis alone, I would allow tolling by the Court of [Appeals for Veterans Claims].

Id. at 1370.

The majority alludes to such statements by "recogniz[ing] the beneficent foundation that, in part, led the Federal Circuit to apply equitable tolling," *ante* at 220, but finds it insufficient as a basis to reject the *Bowles* construction of "the jurisdictional importance of congressionally imposed periods of appeal," *ante* at 221. As I explained above, an appeal in the Article III courts is fundamentally different from an appeal to this Court. I suggest that this Court should confront that difference, and should account for the fact that it is "set in a sui generis adjudicative scheme," *id.,* and that, in order to obtain review in this Court, a claimant must "satisfy formal legal requirements, often [and, as in this case when Mr. Henderson filed his NOA,] without the benefit of legal counsel." *Bailey,* 160 F.3d at 1365. In creating this Court to provide judicial review of final decisions of the Board of Veterans' Appeals, did Congress truly intend for this Court's jurisdiction to be limited by a temporal restriction in the face of extraordinary circumstances, in the same way that the Article III courts of appeals' jurisdiction is limited?

Appendix B

The Supreme Court has held that interpretive doubt in veterans benefits statutes should be resolved in the veteran's favor. *See Brown v. Gardner*, 513 U.S. 115, 117-18, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991); *see also Kirkendall*, 479 F.3d at 843 ("Even if this were a close case . . . the canon that veterans' benefits statutes should be construed in the veteran's favor would compel us to find that [the statute in question] is subject to equitable tolling."). For the reasons described above, I have doubts that Congress intended this Court's review to be circumscribed in the way the Court today concludes it must be. When there is doubt, should we not construe the statute in the veteran's favor?

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS DATED AUGUST 3, 2007

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 05-0090

DAVID L. HENDERSON,

APPELLANT,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before GREENE, *Chief Judge,* and HAGEL and SCHOELEN, *Judges.*

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

In a March 14, 2006, single-judge decision, the Court dismissed Mr. Henderson's appeal of an August 30, 2004, decision of the Board of Veterans' Appeals as untimely after determining that equitably tolling the 120-day appeal period for filing a Notice of Appeal provided by 38 U.S.C. § 7266(a) was not warranted. Mr. Henderson

filed a motion for reconsideration or, in the alternative, for a panel decision. The motion for reconsideration was granted and the matter was submitted to a panel. Subsequently, the parties submitted additional evidence and argument concerning the issue of equitable tolling based on mental illness or physical disabilities. While the matter continued on appeal, the Supreme Court of the United States held that the "timely filing of a notice of appeal in a civil case is a jurisdictional requirement" and Federal courts have no authority to create equitable exceptions to jurisdictional requirements. *Bowles v. Russell,* 127 S.Ct. 2360, 2366 (2007).

Accordingly, the parties are ordered to prepare supplemental memoranda of law to specifically discuss the following issue:

> What effect, if any, does *Bowles* have on the line of cases currently allowing for equitable tolling of the time limitations prescribed for filing an appeal under 38 U.S.C. § 7266(a)?

Upon consideration of the foregoing, it is

ORDERED that, not later than 14 days after the date of this order, Mr. Henderson file and serve on the Secretary a supplemental memorandum of law of 10 pages or fewer, addressing the above issue. It is further

ORDERED that, not later than 14 days after service of Mr. Henderson's supplemental memorandum of law, the Secretary file and serve on Mr. Henderson a

supplemental response of 10 pages or fewer, addressing the above issue. It is further

ORDERED that, not later than 28 days after the date of this order, any interested amicus curiae may file a supplemental memorandum of law of 10 pages or fewer, addressing the above issue.

DATED: AUG 3 - 2007 PER CURIAM.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS DATED OCTOBER 31, 2006

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 05-0090

DAVID L. HENDERSON,

APPELLANT,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before GREENE, *Chief Judge*

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On January 12, 2005, the Court received the appellant's Notice of Appeal (NOA) from an August 30, 2004, decision of the Board of Veterans' Appeals (Board). On January 31, 2005, the appellant was ordered to explain why his appeal should not be dismissed as untimely. On February 7, 2005, the appellant responded stating that medication he was taking had caused him to be unable to timely file his NOA.

Appendix D

On July 5, 2005, the Court ordered the appellant to file a response showing that a medically-diagnosed illness was the cause of his failure to file a timely NOA. On September 15, 2005, the appellant provided a statement from his physician reporting that his medical and psychiatric impairments make him incapable of rational thought or deliberate decision making, and unable to handle his own affairs or function in society on his own.

On March 14, 2006, in a single-judge decision, the Court determined that tolling the 120-day appeal period was not appropriate and dismissed the January 2005 NOA as untimely. After the Court granted three extensions of time, on July 17, 2006, the appellant filed a motion for reconsideration or, in the alternative, for a panel decision.

Upon consideration of the foregoing, it is

ORDERED, that the March 14, 2006, order is REVOKED. It is further

ORDERED, that the motion for reconsideration is granted. It is further

ORDERED, that the Clerk of the Court is directed to submit this issue to a panel for consideration.

DATED: October 31, 2006

BY THE COURT:
s/ William P. Greene, Jr.
WILLIAM P. GREENE, JR.
Chief Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS DATED MARCH 14, 2006

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 05-0090

DAVID L. HENDERSON, APPELLANT,

V.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENE, *Chief Judge.*

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On January 12, 2005, the Court received the appellant's Notice of Appeal (NOA) from an August 30, 2004, decision of the Board of Veterans' Appeals (Board). On January 31, 2005, the appellant was ordered to explain why his appeal should not be dismissed as untimely. On February 7, 2005, the appellant responded to the Court's order stating that because the medication he was taking for his back problems left him "sleepy" and "confused" he had been unable to timely file his NOA. Subsequently, the Court issued an order stating that in order to obtain the benefit of equitable tolling

the appellant must show that the failure to file a timely appeal was the direct result of a mental or physical illness that rendered him incapable of rational thought, deliberate decision making, handling his own affairs, or functioning in society. *See Henderson v. Nicholson*, U.S. Vet.App. No. 05-90 (July 5, 2005, order) (citing *Arbas v. Nicholson*, 403 F.3d 1379 (Fed. Cir. 2005) and *Barrett v. Principi*, 363 F.3d 1316 (Fed. Cir. 2004)). The Court directed the appellant to file a response to the order providing medical or other evidence satisfying the equitable-tolling burden. *Id.*

In response to the Court's order, Mr. Henderson submitted a letter from his psychiatrist, Dr. Raouf Badawi, who stated:

> In addition to the fact that [Mr. Henderson] is a chronic paranoid schizophrenic who has a seizure disorder, he is also hypertensive and experiences chronic severe lower back pain. Recently, he was placed by his local physician on Hydrocodone, a narcotic, which further compromised his memory and ability to function. He has been spending most of his time sleeping since the Hydrocodone was added to his medication. In effect, [Mr. Henderson] has a variety of medical and psychiatric impairments that make him incapable of rational thought or deliberate decision making, and he is unable to handle his own affairs or [function] in society without much help from his wife.

Attachment at 1.

Appendix E

This Court's appellate jurisdiction derives exclusively from statutory grants of authority provided by Congress and may not be extended beyond that permitted by law. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). The ultimate burden of establishing jurisdiction rests with the appellant. *See McNutt v. G.M.A.C.*, 298 U.S. 178 (1936); *Bethea v. Derwinski*, 2 Vet.App. 252 (1992). To be timely under Rule 4 of this Court's Rules of Practice and Procedure and precedents construing 38 U.S.C. § 7266(a), an NOA must be filed with the Court within 120 days after the notice of the Board decision is mailed to an appellant.

In limited circumstances, the statutory period prescribed for the filing of an NOA may be equitably tolled. *See*, *e.g.*, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Arbas*, 403 F.3d at 1381 (equitable tolling of 120-day filing period may be justified if veteran shows that failure to file timely was direct result of physical illness); *Barrett*, 363 F.3d at 1321 (equitable tolling of 120-day filing period may be justified if veteran shows that failure to file timely was direct result of mental illness); *Bailey v. West*, 160 F.3d 1360, 1364 (Fed. Cir. 1998) (en banc) (equitable tolling of 120-day filing period may be warranted where VA misled or induced claimant into missing filing deadline). In *Barrett*, the United States Court of Appeals for the Federal Circuit concluded that the following standards govern claims of untimely filing due to mental incapacity:

> [T]o obtain the benefit of equitable tolling, a veteran must show that the failure to file was the direct result of a mental illness that rendered him incapable of "rational thought or deliberate decision making," or "incapable of handling [his] own affairs or unable to function [in] society." A medical diagnosis alone or vague assertions of mental problems will not suffice. And, if he is represented by counsel during the relevant period, the veteran must make an additional showing that the mental illness impaired the attorney-client relationship.

Barrett, 363 F.3d at 1321 (citations omitted).

In this case, Mr. Henderson has shown that his mental illness and medical impairments rendered him incapable of rational thought or deliberate decision making and unable to handle his own affairs or function in society, but he has not met the burden of demonstrating that his failure to file a timely NOA was the *direct result* of either his mental illness or physical condition. *See id*; *Arbas*, *supra.* An incapacitating mental or physical illness by itself is not sufficient for equitably tolling the judicial-appeal period. *See Barrett*, *supra*; *Claiborne v. Nicholson*, 19 Vet.App. 181, 185-86 (2005) (equitable tolling not appropriate when appellant failed to establish that his failure to file timely NOA was "direct result" of his mental illness); *McCreary v. Nicholson*, 19 Vet.App. 324, 331 (2005) (appellant must establish causal link between mental or physical illness

and untimely filing). Here, Mr. Henderson has not shown how a mental or physical illness caused his NOA to be untimely. Thus, although the Court is sympathetic to the difficulties faced by the appellant, tolling the 120-day appeal period is not appropriate. *See Irwin*, 498 U.S. at 89; *Bailey*, 160 F.3d 1360; *see also Arbas* and *Barrett*, both *supra.* Accordingly, the NOA is untimely and, therefore, there is no jurisdiction to entertain this appeal.

Upon consideration of the foregoing, it is

ORDERED that this appeal is DISMISSED for lack of jurisdiction.

DATED: March 14, 2006

BY THE COURT:

s/ William P. Greene, Jr.
William P. Greene, Jr.
Chief Judge

APPENDIX F — OPINION OF THE BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS AFFAIRS DATED AUGUST 30, 2004

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

C 16 960 578

IN THE APPEAL OF
DAVID L. HENDERSON

DOCKET NO. 03-24 052

DATE AUG 30 2004

On appeal from the
Department of Veterans Affairs (VA) Regional Office (RO)
in Winston-Salem, North Carolina

THE ISSUE

Entitlement to special monthly compensation (SMC) based on the need for the regular aid and attendance or being housebound.

REPRESENTATION

Appellant represented by: Veterans of Foreign Wars of the United States

ATTORNEY FOR THE BOARD

J. Barone, Associate Counsel

Appendix F

INTRODUCTION

The veteran had active military service from September 1950 to June 1952.

This matter comes before the Board of Veterans' Appeals (Board) from a rating decision of the RO.

The veteran was scheduled to testify before a Veterans Law Judge in Washington D.C. in May 2004. He cancelled his personal hearing and has not requested that it be rescheduled.

FINDINGS OF FACT

1. All information and evidence necessary for an equitable disposition of the appeal have been obtained.

2. The veteran's only service-connected disability is schizophrenia, evaluated as 100 percent disabling.

3. The service-connected schizophrenia is not shown to have rendered the veteran so helpless as to be unable to care for himself, protect himself from the hazards incident to his environment or attend to the needs of nature; nor does it prevent him from leaving his home.

Appendix F

CONCLUSION OF LAW

The criteria for an award of special monthly compensation based on the need for regular aid and attendance of another person or upon housebound status have not been met. 38 U.S.C.A. §§ 1114(1), (s) (West Supp. 2002); 38 C.F.R. §§ 3.350, 3.351 (2003).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

1. Factual Background

The veteran's service medical records indicate that he was diagnosed with schizophrenic reaction of the paranoid type in service. He was subsequently discharged. Service connection has been in effect for schizophrenia since June 1952.

An evaluation of 100 percent for the veteran's schizophrenia has been in effect since January 1992. While the veteran has numerous other medical disabilities, none are service connected.

The private hospital records dated in November 1999 and December 2000 show treatment for seizures.

The veteran submitted a claim for SMC in August 2001. A September 2001 statement from the veteran's wife indicates that the veteran had difficulty with his balance and he had been falling. She stated that the veteran had suffered from seizures.

Appendix F

In a September 2001 medical statement, a private physician indicated that the veteran could not leave home without the assistance of another person. He also indicated that the veteran could not feed himself, bathe, perform toilet functions or dress without assistance.

In October 2001 the veteran indicated that his VA physician had changed his medications. He noted that he had home care three tunes per week.

The private psychiatric records reflect that the veteran was seen every three months. A September 2001 treatment note states that the veteran was doing well.

A VA aid and attendance examination was conducted in April 2002. The examiner noted that the veteran was service connected for schizophrenia with a 100 percent disability evaluation. The veteran reported that, although his driver's license had been suspended due to his seizures, it had been restored and that he did occasionally drive. He stated that he was not entirely restricted to his home as a daily environment.

The veteran arrived at his examination in a wheelchair and had a cane. He was able to lift himself from the wheelchair and walk with his cane. He complained of urinary urgency, but not incontinence. He was able to dress. The veteran's wife noted that she cooked daily, attended his appointments, ensured that he took his medication, and helped the veteran to dress.

The examiner concluded that the veteran did not require constant supervision or attendance, but indicated that for the veteran's safety, it would be better to be attended in the event of seizures or difficulty with his balance.

An August 2002 medical statement from a private physician indicates that the veteran was wheelchair bound with very limited mobility and was unable to walk or leave the home without the assistance of another person. The physician noted that the veteran could feed himself and attend to his toilet functions, but could not bathe or dress without assistance.

An additional August 2002 medical statement indicates that the veteran could walk 20 feet without assistance. It notes that the veteran could not leave his home, bathe, perform toilet functions or dress without assistance. The veteran was noted to require a wheelchair and walker.

The veteran was hospitalized at a VA facility from September to October 2002, for detoxification therapy and psychiatric care. On admission, the veteran's wife reported that he had suffered a change in mental status. She also indicated that the veteran had been unsteady on his feet with a history of repeated falls and incontinent of urine for more than one year. She reported that he had been drinking in the previous month after a 15-year period of sobriety.

On admission, the veteran was alert, attentive and cooperative. He was cooperative and appropriate in his

behavior. The discharge summary indicates that the veteran attended to his activities of daily living. He was found to be competent for VA purposes, but unemployable due to his service-connected schizophrenia.

In a November 2002 statement, the veteran's wife noted that he was totally dependent on her for his care. She indicated that his disabilities included swollen feet, sleep disorder, drowsiness and dizziness. She stated that he was unable to dress himself and was often unable to control his bladder function. She noted that a home health care aid visited two days per week.

A November 2002 letter from a private physical therapist assistant notes that the veteran underwent physical therapy on a contract basis from July to August 2002. He indicated that the veteran was at high risk for falling and that adaptive equipment had been provided to decrease his risk of fall injury. He opined that the veteran required motorized equipment to maintain an independent lifestyle due to abnormalities of lower extremity function and decreased balance.

A December 2002 letter from a private physician indicates that the veteran was receiving treatment for voiding problems.

A December 2002 letter from the veteran's VA physician notes that the veteran was treated at the primary care clinic for essential hypertension, seizures, back pain, post-traumatic stress disorder, schizophrenia and a

cognitive disorder. He related that the veteran's medical condition was stable and that his mobility was limited due to chronic low back pain and lower leg swelling. He noted that with medication and close medical supervision, the veteran's mental status was less likely to decompensate.

The veteran's wife submitted a written statement in January 2003. She noted that the veteran had difficulty walking and required a wheelchair and walker. She stated that he suffered from swelling of the feet and legs and frequently became very depressed. She noted that the veteran could not get into bed alone and required assistance with dressing and walking. She indicated that the veteran was drowsy and often fell.

A VA examination was carried out in May 2003. The examiner noted that the veteran was able to partially dress himself and to feed himself. He was noted to require help in getting out of bed and getting in and out of the tub, and putting on his shoes and socks. The veteran was reported to do no chores around the house.

The veteran's wife indicated that a home health aide visited three times per week. The veteran stated that he could walk across a room using a cane, but his wife indicated that he fell often. She reported that the veteran often got restless in bed and rolled out while asleep. The veteran stated that he had a scooter which allowed him to get out into the yard.

The examiner noted that the veteran was driven to the examination in a VA vehicle. He indicated that the veteran was not hospitalized or bedridden. He referred to a VA eye examination which reported visual acuities of 20/30 for the right eye and 20/30 for the left. Diagnoses were those of schizophrenia, hypertension and degenerative joint disease of the spine, knees and hips.

A VA mental disorders examination was also conducted in May 2003. The veteran's history was reviewed. He denied current problems with drugs or alcohol. Mental status examination revealed a somewhat disheveled appearance.

The veteran was accompanied by his wife and sat in a wheelchair. Here were no loose associations or flight of ideas. He was calm and his affect was appropriate. He denied nightmares, flashbacks, and intrusive thoughts. He endorsed hearing voices once or twice per week. He denied suspicions or ideas of reference. He was oriented. Insight and judgment appeared to be marginal.

The diagnoses were those of paranoid schizophrenia in partial remission and alcohol dependence in remission. The examiner opined that the veteran was capable of managing his own financial affairs.

In August 2003, the veteran's wife requested to be appointed as his fiduciary due to his inability to manage his affairs.

An August 2003 VA treatment note indicates that the veteran's wife called, concerned that her husband could not manage his financial affairs. She stated that the veteran had gone to the bank to cash his monthly check, then spent the money drinking with friends. She reported that the veteran had driven after drinking and had been recently stopped for drinking and driving. She also stated that the veteran had been driving with a gun in the car.

In a rating decision dated in December 2003, the RO found the veteran competent to manage his financial affairs.

In a March 2004 medical statement, the veteran's VA physician indicated that the veteran had diagnoses of hypertension, seizures, prostate cancer, arthritis and schizophrenia. He reported that the veteran was unable to walk and required assistance with bathing and dressing. He noted that the veteran could feed himself. He stated that the veteran's decreased mobility was the condition which prevented self-care. He noted that the decrease in mobility was due to multiple medical problems.

II. Veterans Claims Assistance Act of 2000

Initially, the Board notes that the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000) was signed into law in November 2000 and is codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West. 2002). Regulations implementing

the VCAA are codified at 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326 (2003). The VCAA and the implementing regulations are applicable to the present appeal.

The Act and implementing regulations essentially eliminate the requirement that a claimant submit evidence of a well-grounded claim, and provide that VA will assist a claimant in obtaining evidence necessary to substantiate a claim but is not required to provide assistance to a claimant if there is no reasonable possibility that such assistance would aid in substantiating the claim.

They also require VA to notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim.

As part of the notice, VA is to specifically inform the claimant and the claimant's representative, if any, of which portion, if any, of the evidence is to be provided by the claimant and which part, if any, VA will attempt to obtain on behalf of the claimant. Also, VA is required to request that a claimant provide any evidence in his or her possession that pertains to the claim.

In the present case, the veteran's claim for SMC was received in August 2001. The RO responded with a letter dated in September 2001. That correspondence instructed the veteran regarding the evidence necessary to substantiate his claims and requested that he identify evidence supportive of the claims.

Appendix F

A September 2002 letter also informed the veteran of the evidence and information necessary to substantiate his claims. It noted the evidence that had been received and asked the veteran to identify any further evidence. The RO indicated that it would attempt to obtain non-VA records upon receipt of a proper release.

The Board also observes that the veteran was advised, via a June 2003 Statement of the Case and a November 2003 Supplemental Statement of the Case of the information and evidence necessary to substantiate his claims.

In sum, the RO has complied with the notice requirements of the VCAA and the implementing regulations.

In addition, pertinent treatment records have been obtained, and the veteran has been afforded VA examinations. Neither the veteran nor his representative has identified any additional evidence or information which could be obtained to substantiate the claims. The Board is also unaware of any such outstanding evidence or information. Therefore, the Board is also satisfied that the RO has complied with the duty to assist requirements of the VCAA and the implementing regulations.

Appendix F

III. Analysis

An award of special monthly compensation based on housebound status requires either that the veteran have additional service-connected disability or disabilities independently rated at 60 percent, separate and distinct from the 100 percent service-connected disability and involving a different part of the body, or that he be permanently housebound by reason of the service-connected disability or disabilities. A veteran will be considered housebound where the evidence shows that, as a direct result of his service-connected disability or disabilities, he is substantially confined to his dwelling and the immediate premises or, if institutionalized, to the ward or clinical areas, and it is reasonably certain that the disability or disabilities and resultant confinement will continue throughout his lifetime. 38 U.S.C.A. § 1114(s); 38 C.F.R. § 3.351(i).

An award of special monthly compensation based on the need for regular aid and attendance of another person is warranted if the veteran's service-connected disability renders him so helpless or bedridden that he requires the assistance of another individual to accomplish basic daily functions. 38 U.S.C.A. § 1114(1); 38 C.F.R. §§ 3.350(b). Determination as to the need for aid and attendance must be based on actual requirements of personal assistance from others. In making such determinations, consideration is given to such conditions as: inability of a claimant to dress himself or to keep himself ordinarily clean and presentable; frequent need of adjustment of any special prosthetic

or orthopedic appliance which by reasons of the particular disability cannot be done without aid; inability of the claimant to feed himself through the loss of coordination of upper extremities or through extreme weakness; inability to tend to the wants of nature; or incapacity, physical or mental, that requires care and assistance on a regular basis to protect claimant from the hazards or dangers incident to his daily environment.

"Bedridden" will be a proper basis for the determination and is defined as that condition which, through its essential character, actually requires that the claimant remain in bed. It is not required that all the disabling conditions enumerated above be found to exist before a favorable rating may be made. The particular personal functions that the claimant is unable to perform should be considered in connection with his condition as a whole. It is only necessary that the evidence establishes that the claimant is so helpless as to need regular aid and attendance, not that there be a constant need. 38 C.F.R. § 3.352(a) (2003).

The Board first notes that the veteran's only service-connected disability is schizophrenia, evaluated as 100 percent disabling. In addition, the evidence demonstrates that the service-connected disability has not rendered him housebound or in need of the regular aid and attendance of another person. In this regard, the Board notes that the veteran suffers from a variety of physical ailments, which have created the need for assistance from his wife and a home health care aide.

Appendix F

The private and VA outpatient records, as well as VA examination reports, mostly note the veteran to be fully oriented and to be competent to handle his finances. Although medical records indicate a measure of impairment in daily functioning due to psychiatric symptoms, the medical evidence of record clearly reflects that the veteran's decrease in mobility due to multiple medical problems is the basis for his inability to attend to activities of daily living.

There is no indication that the veteran's service-connected schizophrenia has a significant impact on his ability to attend to his daily needs. In fact, a May 2003 mental disorders examination report indicates that the veteran's schizophrenia was in partial remission.

Moreover, the veteran's VA physician, in a March 2004 statement, indicated that the condition which prevented self care was decreased mobility. Also significant the fact that the RO determined upon review of the evidence in December 2003 that the veteran was competent to manage his financial affairs.

In sum, veteran's schizophrenia, his sole service connected disability, has not created the need for regular aid and attendance. Nor has it rendered him housebound.

Accordingly, the Board concludes that the veteran has not met the criteria for the award of SMC benefits based on a need for regular aid and attendance.

As the preponderance of the evidence is against the veteran's claim for SMC based on the need for the regular aid and attendance of another person or being housebound, the benefit-of-the-doubt rule does not apply, and the claim must be denied. 38 U.S.C.A. § 5107(b); *Gilbert v. Derwinski,* 1 Vet. App. 49 (1990).

ORDER

Special monthly compensation based on the need for the regular aid and attendance of another person or being housebound is denied.

s/ Stephen L. Wilkins
STEPHEN L. WILKINS
Veterans Law Judge,
Board of Veterans' Appeals